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The Justice Mission of American Law Schools

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THE JUSTICE MISSION OF AMERICAN LAW SCHOOLS¹

DAVID BARNHIZER²

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Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger. And as in the latter state even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves.

THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961).

¹ This article, like the Justice Mission Conference itself, is dedicated to the memory of Bob McKay, one of the most decent and just people with whom I have had the privilege to work.

I want to express my appreciation to Michael Ariens, Paul Carrington, Anthony D'Amato, Deborah A. Geier and James Wilson for insightful comments made on earlier drafts of this article. My particular thanks go to April Mixon who worked tirelessly on the many revisions of not only this article but the entire symposium issue.

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I. INTRODUCTION

Most faculty in American law schools would deny the appropriateness of any mission that requires them to either understand or advance justice.³ Their hesitance is understandable. Practical people, and law faculty generally fit into this category, tend to suspect what they perceive as particularly loose concepts and terms capable of being abused and manipulated to serve any end.⁴ Justice is admittedly such a term. Justice reeks of oft-maligned

³James Taylor, for example, has described an interview he conducted with a group of law students. "As for questions of morality, justice, and human feelings, we were told that a stock answer was provided by some faculty members: 'If you want to talk about that, the school of religion is just down the street.'" See James B. Taylor, *Law School Stress and the Deformation Professionelle*, 27 J. LEGAL EDUC. 251, 265 (1975). There has been substantial change in this attitude since 1975. See, e.g., ANTHONY D'AMATO & ARTHUR JACOBSON, *JUSTICE AND THE LEGAL SYSTEM* (1991); JEROLD AUERBACH, *UNEQUAL JUSTICE* (1976) [hereinafter *UNEQUAL JUSTICE*]; MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1992); DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1991); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992); Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1 (1990). D'Amato argues that legal education "lacks a soul . . ." *Id.* at 1. He recommends that "law schools should deliberately turn away from the study of law-words and instead study justice. . . . [J]ustice is the only legitimate goal of law school study." *Id.* See also Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1313 (1990); and an intriguing attempt to apply the moral concepts of justice to another species in Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L LAW 21 (1991). The basic question about the obligation and role of law faculty and law schools to deal with concerns of justice would still attract only a limited minority of faculty support. Even that minority would dissipate abruptly if anyone attempted to be specific in terms of the obligation.

⁴An effect of Enlightenment positivism is that it "tends to banish God and the supernatural from the universe." CRANE BRINTON, *IDEAS AND MEN: THE STORY OF WESTERN THOUGHT* 513 (1950). Positivism of the kind Western secular intellectuals have practiced also banishes metaphysics and justice. Rollo May sees one reason for the rejection by modern intellectuals of emotion, values, unconscious thought, and the processes of creativity to be related to the technical worldview that has dominated our cultural ethos. ROLLO MAY, *THE COURAGE TO CREATE* (1978). This belief system has created a de facto religion some call *Scientism*, an absolutist and naive faith that science can reveal all and that other methodologies are meaningless at best. "Mechanization", May suggests,

requires uniformity, predictability, and orderliness; and the very fact that unconscious phenomena are original and irrational is already an inevitable threat to bourgeois order and uniformity.

This is one reason people in modern Western civilization have been afraid of unconscious and irrational experience. For the potentialities

metaphysics,⁵ and sounds far too much like natural law, an idea fraught with the vagaries and polemics of religion and propaganda.⁶ For the past two centuries the ideas and methods of metaphysics and its subset, natural law, concepts intimately linked with justice, have been condemned as unscientific pap⁷—the refuge of superstitious fools and demagogues who lacked either the

that surge up in them from deeper mental wells simply don't fit the technology which has become so essential for our world.

Id. at 69.

⁵ See Jerold S. Auerbach, *What Has the Teaching of Law to Do With Justice?*, 53 N.Y.U. L. REV. 457 (1978) [hereinafter *Teaching of Law*]. Auerbach suggests that "[p]erhaps an irreconcilable disparity must exist between law (rules, or the formal procedures for resolving disputes) and justice (the fairness of results produced by the legal system)." *Id.* at 457. What we have not learned to do is to explore the overlapping intersections between rules of positive law and the deeper values and sources of justice. Because such sources and values have been abused, we have attempted to construct rigid barriers between law and justice. Michael Ariens suggests this is classically found in legal process scholars of the 1950's. See Michael Ariens, *Progress is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQUIRY 213 (1992). The answer is to learn better how to develop the concepts and language of intermediate, applicational and practical justice and work to define how those intermediate rules of justice reinforce, generate, interpret and undergird the substance and process of law. I sought to describe how legal doctrines represent part of this process in the latter part of an article published in 1989. See David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109 (1989) [hereinafter, *The University Ideal*].

⁶ In *Rochin v. California*, 342 U.S. 165 (1952), for example, Justice Frankfurter illustrated the negative attitudes that have come to be associated with natural law by disassociating his idea of due process from natural law. "Due process of law thus conceived is not to be derided as resort to a revival of 'natural law.'" *Id.* at 171 (citing Morris R. Cohen, *Jus Naturale Redivivum*, 25 PHIL. REV. 761 (1916)). For an analysis of attitudes toward natural law, see David Barnhizer, *Natural Law as Practical Methodology: A Finnisian Analysis of City of Richmond v. J.A. Croson, Co.*, 38 CLEV. ST. L. REV. 15 (1990); and JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

⁷ Robert Hutchins, long-time president of the University of Chicago, and dean of Yale Law School in the late 1920's, on the other hand, urged more attention to metaphysics in the law schools rather than less. ROBERT M. HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 98 (1936). See also LAURA KALMAN, *LEGAL REALISM AT YALE, 1920-1960* (1986). Hutchins recommended abandonment of the basic form of the American university law school with the study of law becoming part of the study of metaphysics, the science of "first principles." Hutchins proposed a highly theoretical and metaphysical model of legal education during the first two years of law school. Technical training could be done during the third year, conducted on the university campus but separated from the first two years of legal education. This was Hutchins' concession to the economic needs of universities and the fact that technical

discipline or the willingness to pursue the mysteries of the universe through the rigorous and demanding methods of science.⁸ "Justice," as the claim might go, is as ignorant and Sisyphean a quest as were the medieval searches for the Philosopher's Stone, through which base metals were thought to be transmuted into gold, or the Holy Grail.

For the last several centuries we have measured intellectual (as opposed to aesthetic) genius almost exclusively by the accomplishments of such individuals as Copernicus, Newton, Galileo, Einstein, Planck, Freud, Bohr, Heisenberg, Oppenheimer, and now Stephen Hawking.⁹ The difficulty this

training could perhaps be best done most efficiently in a centralized reflective setting. *Id.* at 98-114.

⁸ Extremism of any kind, whether science, philosophy, politics or religion, distorts our vision. James Collins remarks:

There are two false routes by which the human mind seeks to fulfill the need for a deeper grasp on being. One is the way of scientism, which refuses to recognize the essential boundaries of scientific thought. The other is an undisciplined appeal to sheer feeling and purported irrational sources of insight.

JAMES COLLINS, *CROSSROADS IN PHILOSOPHY: EXISTENTIALISM, NATURALISM, THEISTIC REALISM* 33 (1962). Edward O. Wilson offers an expanded concept of science as an alternative:

Because the guides of human nature must be examined with a complicated arrangement of mirrors, they are a deceptive subject, always the philosopher's deadfall. The only way forward is to study human nature as part of the natural sciences, in an attempt to integrate the natural sciences with the social sciences and humanities.

EDWARD O. WILSON, *ON HUMAN NATURE* 6 (1978).

⁹ This is not a criticism of those named individuals of inspiring brilliance. It is, however, a recognition that the scientific method is inadequate for many of the most fundamental concerns with which humans must deal. To be a human intellectual in the truest sense is to seek a methodological "Rosetta Stone" to unlock the secrets and mysteries of life in the universe. Clearly this is a part of what Stephen Hawking is doing in the field of *quantum cosmology* and what others are seeking as they pursue a Grand Unified Theory or a Theory of Everything in physics. See STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME* (1987), in which Hawking's theorizing about the nature of the physical universe merges into the beginning stages of a conception of God. The drive to uncover the methodology that allows us to penetrate to the ultimate secrets of the universe is, however, so powerful that we can be easily deceived. David Noble, for example, distinguishes Enlightenment *philosophes* from Twentieth Century *intellectuals*, by describing our mindset as being exclusively based upon factual scientific interpretation, contrasted with the *philosophes* who rejected the rigid forms and limits of medieval Catholicism, but continued to believe in an inherently rational universe perceivable by the conscious processes of the human mind. Their faith in reason provided a simple key that was "the little backstairs door that for any age serves as the secret entrance way to knowledge." DAVID W. NOBLE, *THE PARADOX OF PROGRESSIVE THOUGHT*

creates for those interested in concerns of justice is that, in the precise and quantifiable world of science, immeasurable premises we can neither validate nor invalidate¹⁰ are not even considered worth pursuing.¹¹ They divert,

(1958) (citing CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932)).

¹⁰ *Scientism* creates an artificial hierarchy of legitimacy based upon unsupportable assumptions about human nature. A thinly drawn system predicated on absolute faith in science and reason is almost unthinkingly placed at the top of the ranking, at the expense of all other patterns of inquiry. Even more critical is the refusal to examine all the dimensions and limits of science and reason, preventing us from creating the integrated syntheses that are so important to our task. The belief that a separate and higher faculty of reason exists in addition to, and in qualitative contradiction of, the "lower" human sensory processes which deal with the everyday world of appearances has characterized Western thought for over two thousand years. See, e.g., Maxine Greene's description of how it has dominated our intellectual and educational ideals. MAXINE GREENE, *TEACHER AS STRANGER* (1974) [hereinafter *TEACHER AS STRANGER*]. But it is not only a Western attitude. In the *Bhagavad - Gita*, for example, Krishna, in a scripture dating from the fifth century, B.C., states: "The senses, they say, are higher than the limbs; higher than the senses is the mind; higher than the mind is understanding; but higher than understanding is the eternal soul." *THE BHAGAVAD - GITA* 20 (Peter Pauper Press ed., 1952).

¹¹ Rollo May argues this has produced a compartmentalization of human nature and personality, concluding: "the person, in 'pieces' within as well as without, does not know which way to go." ROLLO MAY, *MAN'S SEARCH FOR HIMSELF* 46 (1953). The themes of alienation, fragmentation, and of reintegration of the full human perspective and essence run throughout modern literature. The idea of alienation—from ourselves, from others, and from the essences of the physical and spiritual world—is a theme of increasing intensity. See, e.g., *MAN ALONE: ALIENATION IN MODERN SOCIETY* (Eric & Mary Josephson eds., 1962). A significant part of the reformist literature of American legal scholarship of the past twenty years at least tacitly explores the need to rejoin the essence of the person with values and a system of ethics and morality. The Clinical Movement, Legal Humanism, some aspects of ADR, jurisprudence, professional responsibility and other areas of teaching and scholarship represent the desire to assist law students, faculty and lawyers to generate a more unified and coherent definition of self along with the understanding and methods needed to make it work. A substantial and at least partly intractable obstacle to such a quest is the nature, expectations and institutional methods of law practice. These comprise a "technical" universe in which the individual does not have complete free will and must serve ends by fitting into powerful processes and institutions that are in control. This is what Jacques Ellul is referring to when he describes the *rule of technique*. See JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (John Wilkinson trans., 1964) [hereinafter *THE TECHNOLOGICAL SOCIETY*]. See also *infra* notes 52 and 95 and accompanying text. This makes it absolutely imperative that we generate an internal sense of

mislead, and manipulate our values and perspectives while preventing attainment of true insight.¹²

Justice, therefore, has been seen by many scholars as a premise about which much can be said but virtually nothing either proved or disproved through the application of the methodologies that provide the grounding for science.¹³ A superficially conceived version of this attitude has dominated American law schools for more than a century, rendering much of their work sterile and unimportant. This is because in its full richness and vitality the law represents an incompressibly fluid, uncontrollable (from a scientific perspective), political, emotional and philosophical construct impossible to capture adequately through the application of scientific methodologies, at least of the kind to which we have limited ourselves.¹⁴ Law in its rich form is inextricably

justice, for it is the only chance we have to overcome the force of *technique*. The challenge is extraordinary.

¹²Johannes Hirschberger describes the price we have paid:

The so-called progress of modern science, which became almost a god to the Enlightenment, today threatens to become a deadly danger because of the undreamt of possibilities of technology, and it would seem that from the very beginning something was wrong. The real flaw was a forgetfulness of true being, a disorientation, a readiness to ignore the subject matter of metaphysics which would have freed the Enlightenment from a slavery to materialism.

JOHANNES HIRSCHBERGER, A SHORT HISTORY OF WESTERN PHILOSOPHY 127 (1977).

¹³Crane Brinton defines this sphere of knowledge as *noncumulative*, contrasting it with scientific and technical knowledge, *cumulative* knowledge. Noncumulative knowledge is that of literature and philosophy, aesthetics, justice, and morality. This represents the kind of knowledge in relation to which we find we are saying largely the same things as did the thinkers of two thousand years ago. Brinton takes care to stress that the distinction is not one of qualitative value but one of difference. CRANE BRINTON, IDEAS AND MEN 12-13 (1950). Justice falls into the noncumulative dimension and we need to develop better methods for appreciating its nature, content and consequences. Like wisdom and the metaphysics of which it is a part, justice is an open textured, dynamic, politically rich and highly subjective term. This is reflected by Eugene Rice in his description of the shifting definitions of wisdom, an insight equally integral in understanding and applying concerns of justice. See EUGENE RICE, THE RENAISSANCE IDEA OF WISDOM 2 (1958). Oddly, the pattern of complete transformation of the internal meaning of a doctrine, while the external language remains unchanged, is a defining characteristic of the common law. Roscoe Pound noted that law grows, not only consciously but also through the use of fictions. See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 173 (1991).

¹⁴Law's incompressibility and methodologically uncontrollable variables were central themes of my analysis of legal knowledge in *Prophets, Priests and Power-Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*,

linked with the deeper values of justice, predominantly through intermediating structures of doctrine which help to make the principles of justice politically concrete and interpretationally and applicationally accessible to humans.

While justice is undeniably representative of a slippery and evasive set of concepts,¹⁵ it paradoxically reflects the fundamental values of Western society without which we cannot hold together the thin tissue of political organization that we call the "Rule of Law."¹⁶ Even if we accept the premise that justice is an

50 U. PITT. L. REV. 127 (1988) [hereinafter *Prophets, Priests and Power-Blockers*], and the latter sections of *The University Ideal*, *supra* note 5, discussing the structure and intermediating functions of legal doctrine. This is an important part of Posner's argument in Richard Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1129-30 (1981). A recent article of interest is Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439 (1992). See also Wilson Van Dusen, *The Natural Depth in Man*, in CARL ROGERS & BARRY STEVENS WITH EUGENE T. GENDLIN, JOHN M. SHLIEN, WILSON VAN DUSEN, *PERSON TO PERSON: THE PROBLEM OF BEING HUMAN* 214 (1967). Van Dusen makes the following observation concerning the relationship between science and humanism:

There is a growing confluence of people in psychology and kindred disciplines who move in the direction of humanism while respectful of science. Rogers is an example and so is the loosely integrated and somewhat diverse group of existentialists and the real Adlerians. I expect and hope the confluence will be called humanism. The confluence can be as large as the humanities themselves. Science and humanism have different aims, though they can be productive brethren. Humanism can supply root questions and root speculations of man together with raw data of human experience—phenomenological descriptions. The science of psychology can be considerably enriched by this data; yet the aim of science is toward the communal, common, consensually validated—what is general or lawful and can be measured and shown consistently by publicly agreed upon methods.

Id. at 215.

¹⁵ Because justice is interpreted through language, politics, human nature and values, it is inescapably malleable and shifting, even though anchored to a set of foundational principles. Lloyd and Freeman capture this in their statement:

Ordinary language, in which law is necessarily expressed (for how otherwise could its contact with real life be maintained?) is not an instrument of mathematical precision but possesses what has been happily described as an "open texture" . . . Rules of law are not linguistic or logical rules but to a great extent *rules for deciding*.

DENNIS LLOYD & MICHAEL FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 1140 (5th ed. 1985).

¹⁶ "[J]ustice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political

integral part of a healthy society, it is difficult to assess the appropriateness and content of a justice mission for American law schools both because the metaphors and spirit of science have dominated our perspectives completely during the unfolding of the Enlightenment and the age of modern science, and because propositions about justice have been loaded heavily with questionable and sloppily slung baggage. Understanding the content, assumptions, functions, implications and deficiencies of what has been said about justice over a period of three thousand years is in itself a daunting task. It involves examining an amorphous complex of assertions and beliefs as well as religious and political systems. It invokes concepts of God and the universe, human nature and the functions and limits of human society. Going beyond that level of understanding and developing workable tools that allow principles and values of just thought and action to be brought into our decision process is even more difficult. Of course, that is what we have unconsciously attempted to do with meta-doctrines such as due process and equal protection.¹⁷

society." ARISTOTLE, *Politics*, in 2 THE WORKS OF ARISTOTLE, bk. I, ch. 2 (Benjamin Jowett trans., 1952) [hereinafter ARISTOTLE, *Politics*]. Without a shared set of principles we respect and accept as valid criteria for key decisions, the willingness to follow decisions we disagree with, and to respect the integrity of the institution responsible for the decision, becomes weakened. Rather than a community we become increasingly more like the inhabitants of an uncomfortably real sort of Hobbesian state of nature in which everyone is seeking advantage over everyone else. See THOMAS HOBBS, *THE LEVIATHAN* (Penguin 1986). Ruthlessness, intolerance, and selfishness prevail. See James Nickel's analysis of Rawls's attempt to develop the idea of political community, one Rawls terms "social unity" based on "general acceptance by the population of a certain conception of justice." James W. Nickel, *Rawls on Political Community and Principles of Justice*, 9 LAW PHIL. 205 (1990); and John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989).

¹⁷This effort has been handled so poorly and confusedly that it has contributed to our fear of judicial discretion concerning fundamental value choices and has caused the desire for strict and mechanistic interpretations of principles that cannot be neatly boxed through such formalistic devices. See, e.g., Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229. Leff sums the dilemma:

What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.

I think that the two contradictory impulses which together form that paradox do not exist only on some high abstract level of arcane *angst*. In fact, it is my central thesis that much that is mysterious about much that is written about law today is understandable only in the context of this tension between the ideas of found law and made law: a tension particularly evident in the growing, though desperately resisted, awareness that there may be, in fact, nothing to be found—

The problems with most of the writing about justice are several: it tends to begin the dialogue with a lack of depth and honesty about the fundamental assumptions used to provide the baseline for the argument; or it posits a belief in such phenomena as God or Logos, creating in the process an inherently spiritual or rational universe of which humans are often assumed to be an integral part; or the writing masks its nature as a legitimating principle for beliefs preferred by its advocates. As is described in the latter part of this article, justice is in fact a simple metaprinciple, one about which we need not be able to establish its cosmic validity to make it meaningful and from which the underlying ordering of human society emerges.¹⁸

Justice in application operates on a different level of intensity and detail than does justice in theory. The difficulty of understanding the volumes of existing material developed through millenia on questions of the nature and functions of justice is increased because justice is a fundamentally political phenomenon, even in its theoretical dimensions.¹⁹ As the debate concerning the nature of

that whenever we set out to find "the law," we are able to locate nothing more attractive, or more final, than ourselves.

Id. at 1229.

¹⁸The principle that is consistent throughout a wide and diverse range of sources is that of the healthy human treating others as he or she would wish to be treated. Of course this is the biblical Golden Rule, but the fact it is derived in part from a religious text should not blind us to its human and political import. One could argue in an Hegelian manner to the effect that since virtually all who have considered the issue come up with a principle that reflects this deep value that this demonstrates its natural validity. That is interesting but not essential. It seems sufficient to assert that any society that wishes to commit itself to a more or less democratic system of governance in which security, trust, promise, dignity and minimal use of force are characteristics recognizes that the principle articulated above is the fundamental linchpin in the generation of a widely shared set of values and behaviors that create increased tendencies to behave as participants in a healthy community in which the essential value of human dignity and flourishing is recognized. It may be an absolute condition of natural law, but I have no proof that it is. It may emerge as a natural part of ourselves in an altruistic sense, but I doubt that very much, at least not for all of us or for any of us all the time. It may simply be the most prudential expression of how to create a society that is more likely to best secure, nurture and protect our interests. If it is *only* this, then it is still a sufficient premise on which to base a concept of justice.

¹⁹Justice, in the large sense theoretical justice, represents and provides the philosophical underpinnings of law. Anthony D'Amato responded to this assertion by asking me "why?", positing the alternative that justice is not a meta-legal principle at all, but rather a legal principle. Michael Ariens similarly asked me whether justice can exist without underpinnings, suggesting that foundations are in many respects "stalking horses" and that we might be better off moving our search for justice away from underpinnings or foundations. I conversely see the motive force for justice as an element of human nature, not

justice moves from more abstract considerations of the various and competing theories of justice to increasingly concrete areas of concern, the interactions become steadily more intense and bitter.²⁰ This is because the conclusions reached or implied are not only created with awareness of their implications

necessarily abstract or ideal but generated by two basic human desires: 1) the desire to be treated fairly by others; and 2) the desire to gain advantage over others, in essence, to have more. From this I would derive the conditions of society and law, both good and bad. Even theoretical justice must be reformulated each generation in terms appropriate to the needs and interest of the specific political culture it addresses. This is even more true of applied practical justice. It is like Rousseau's observation that humanity is an historical phenomenon, i.e., that "the human race of one age" is not "the human race of another". John Scott, *The Theodicy of the Second Discourse: The 'Pure State of Nature' and Rousseau's Political Thought*, 86 AM. POL. SCI. REV. 696 (1992). See the discussion of the reformulative role of judges and scholars in *Prophets, Priests and Power-Blockers*, *supra* note 14. When our concepts of justice fail to be concerned with or address the concerns of the society in which we function, they suffer from the same risk James Collins warned about when he concluded:

A philosophy displays the look of improbability about it when it fails to establish meaningful links with the problems of greatest concern to a particular age, or when it ignores the sources of evidence and method available in that age. When it fails in these two ways, it also disconnects itself from the framework of positions which are taken seriously as relevant interpretations and aids for the reflective minds of the time.

COLLINS, *supra* note 8, at 315.

²⁰Noam Chomsky remarks that the recurring insistence that the university should address the needs of the outside society—often argued as the pursuit of relevance in the universities, when "put in a very general way . . . is justifiable. Translated into practice, however, it usually means the universities provide a service to existing social institutions . . ." See NOAM CHOMSKY, FOR REASONS OF STATE, 301-02 (1970). The injection of the social and politically concrete into the theoretical produces an irresistible tension the university has never been very good at resolving. See, e.g., David Barnhizer, *The Purposes of the University in the First-Quarter of the Twenty-First Century*, 22 SETON HALL L. REV. 1124 (1992) [hereinafter *The Purposes of the University*]. One of our most intriguing challenges is learning how to build bridges between the two dimensions of theory and immediate reality. See Saul Bellow, *Foreword to ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND* (1987). Bellow observes that

The heart of Professor Bloom's argument is that the university, in a society ruled by public opinion, was to have been an island of intellectual freedom where all views were investigated without restriction. Liberal democracy in its generosity made this possible, but by consenting to play an active or "positive," a participatory role in society, the university has become inundated and saturated with the backflow of society's "problems."

Id. at 18.

but are inevitably used in decisions that dictate and justify the allocation and reallocation of social goods, rights, responsibilities, opportunities and privileges.²¹ They become the deep grounding principles we take for granted and rarely even seek to understand because truth is not an essential condition for the success of functioning political systems, a fact which exacerbates the intrinsic dilemma in which legal scholars find themselves.

The scholar's dilemma, particularly those scholars in disciplines such as law that are irreversibly linked to the operation of power and implicit willingness to do violence if necessary, is that societies require shared consensus far more than truth. Negative truths about the scientifically unsupportable premises of our fundamental beliefs might interfere with the quality of the operating consensus, at least for those satisfied with their lot. The stark truth about opportunity, fairness, racial and gender bias, about who receives economic benefits and so forth would not be knowledge that "sets us free" but "sets us at each other's throats". If this sounds familiar, welcome to the final decade of the Twentieth Century, a period in which we have facilely "deconstructed" our fundamental principles, sought to reveal the underlying truths of an unfair social system, and created a political context filled with hollow slogans based on intense propaganda campaigns both defensive and offensive in character, designed to mask the emptiness into which our "intellectuals" have cast us and designed to either retain or obtain power for their advocates. For many, even if gaining power is not a realistic probability, there is at least some satisfaction in wounding the source of one's perceived injustice or, like Samson, suicidally bringing the temple down on their heads.²²

This is the dilemma from which we must struggle to extract ourselves and our political community. Understanding justice and developing the richer dimensions of law in an effort to incorporate its principles are essential aspects

²¹ Philosophical activity provides the bridge for joining together our secular concerns and our religious beliefs, our intellectual interests and the practical arts of life. Because of this unifying work within its own sphere, *philosophy does actually affect the relation of men to the practical organizing of society and the order of grace.*

COLLINS, *supra* note 8, at 303-04 (emphasis added).

²² Maslow offers a series of penetrating insights into our current state of knowledge. See ABRAHAM MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (2d ed. 1968). In his chapter titled "What Psychology Can Learn from the Existentialists," he describes the major premises of European existential psychology. One is "a radical stress on the concept of identity and the experience of identity as a *sine qua non* of human nature and of any philosophy or science of human nature." *Id.* at 9. The other is that "it lays great stress on starting from experiential knowledge rather than from systems of concepts or abstract categories or a priori. Existentialism rests on phenomenology, i.e., it uses personal, subjective experience as the foundation upon which abstract knowledge is built." *Id.* at 9. Maslow describes 15 points of comparison between European existential philosophers and American psychologists.

of our justice mission which is of course at least as important as an on-going and fluid process as any assumptions concerning singular truths, goals, or visions of right. As I suggest at the conclusion of this article, the answer to the dilemma must begin from within us, not with institutional and intellectual externalities. Our problems go to the core of our humanity, our very conception of our *selves*, and will not be resolved short of that source of energy, values, creativity and destructiveness.²³

II. SCIENCE, JUSTICE, AND LANGDELL'S MAGIC FORMULA

Before we can discuss how and why we must change, we need to understand how we reached the conditions of our dilemma. It did not begin with Langdell, because he was only a man of his culture. The change toward scientific justification in the academic study of law was an inevitable step if law schools were to be considered legitimate within a university world moving toward scientific methodologies with lightning speed. The oddity is not that Langdell emerged because in some form changes of the kind he implemented were almost inevitable. But it is extremely troubling that a Langdellian ethos still dominates the intellectual life of American law schools after almost 125 years.

How is it that such a simple formulation—law as a science, judges' decisions as the raw data to be studied as a means to test the assumed principles of law, and law faculty as scientists—has exerted an amazingly powerful influence over the intellectual lives of thousands of American law professors for more than a century? Understanding the power of Langdell's magic formula requires awareness of the intellectual culture of the period during which he was educated and came to the law deanship at Harvard. Translated into the late Nineteenth Century fabric of academic law the scientific metaphor left no room for the pursuit of the meaning of justice either in its theoretical dimensions or in its more applied and inductive aspects.²⁴

²³Michael Ariens recommended to me a book with which I had been unfamiliar. It turns out to be a compassionate and profound work that I in turn recommend to anyone interested in the problems of human identity, its sources and its effects on how we view and interpret our world. See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989). Taylor prefaces his analysis with:

I want to designate the ensemble of (largely unarticulated) understandings of what it is to be a human agent: the senses of inwardness, freedom, individuality, and being embedded in nature which are at home in the modern West.

But I also wanted to show how the ideals and interdicts of this identity—what it casts in relief and what it casts in shadow—shape our philosophical thought, our epistemology and our philosophy of language, largely without our awareness.

Id. at ix.

²⁴See Martin L. Smith, *On Being an Authentic Scientist*, 14 IRB 1 (March-April 1992), and his discussion of the attitudes characterizing the early phases of

Langdell's purported "science" was, however, one in name only.²⁵ Neither Langdell nor James Barr Ames were serious scholars, as opposed to teachers

scientific research, and the development of these ideas in *Prophets, Priests and Power-Blockers*, *supra* note 14; *The University Ideal*, *supra* note 5; David Barnhizer, *The Revolution in American Law Schools*, 37 CLEV. ST. L. REV. 227 (1989) [hereinafter *Revolution in American Law Schools*]. Albert Schweitzer has described what happened to the grand systems of logic and metaphysics when confronted by the methods of science during the nineteenth century:

In the artificial method of thinking employed by these great systems, the educated people of the early nineteenth century believe that they possess a basis for the ethical acceptance of the world and of life as a demonstrated necessity of thought. Their joy, however, is of short duration. About the middle of that century under the pressure of a realistic and scientific method of thinking these logical castles in the air crumble and collapse. A period of severe disenchantment sets in, and thought gives up all attempt to make this world comprehensible by either force or artifice. It is ready to resign itself to coming to terms with reality as it is, and to take from it motives for activity which are consonant with an ethical acceptance of the world. But it soon learns by experience that reality refuses to provide what is expected of it. The world is not patient of any interpretation which gives a definite place to ethical activity on the part of mankind.

ALBERT SCHWEITZER, *OUT OF MY LIFE AND THOUGHT* 157 (1953).

Schweitzer offers the principle of *Reverence for Life* to fill the resulting ethical vacuum, saying:

There is no hope of success for any attempt that thought might still make, to attain through some other interpretation of the world to an ethical acceptance of the world.

Reverence for Life brings us into a spiritual relation with the world which is independent of all knowledge of the universe. Through the dark valley of resignation it leads us by an inward necessity up to the shining heights of ethical acceptance of the world.

Id.

²⁵When Langdell was selected by Charles Eliot as Harvard's new dean, to be unscientific was to be irrelevant. Harvard had been severely criticized by reviewers for being excessively theoretical during the few years prior to Langdell's ascendance. A major statement had to be made that demonstrated the commitment to the *only* acceptable intellectual methodology for a university—science. Langdell's formula also served other purposes expressed aptly by Jerrold Auerbach's assessment: "The contagious popularity of the case method perfectly expressed the new ambience of the late nineteenth century. Amid widespread fear of social disorder, American educators, law teachers included, turned for security to scientific expertise and professionalism, to meritocracy and elite rule." *Teaching of Law*, *supra* note 5, at 458; see also UNEQUAL JUSTICE, *supra* note 3. See also Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. AM. CULTURE 25 (1991); Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979).

and administrators. They were technicians and teachers, with Langdell even being described by James Bryant Conant as one of the great inventors of the latter part of the Nineteenth Century.²⁶ In this context Langdell's proclamation that law was a science and could be studied by the application of scientific method was undeniably powerful rhetoric.²⁷ Unfortunately, Langdell and Ames did virtually nothing to develop the fuller meaning of a scientific methodology for the academic analysis of law.²⁸ This might have led them to

²⁶ Law, considered as a science, wrote Langdell.

What did he have in mind when he wrote that word "science"? Not the kind of activity in which at the time Clark Maxwell was engaged; not the development of the atomic molecular theory Langdell was thinking of science much as was Bell or Edison To me, therefore, Langdell is to be placed among the great American inventors of the nineteenth century.

JAMES BRYANT CONANT, TWO MODES OF THOUGHT 45 (1964).

²⁷ Nor was it very honestly or seriously pursued. See, e.g., ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S (1983) [hereinafter LEGAL EDUCATION IN AMERICA]. See also JOEL SELIGMAN, THE HIGH CITADEL (1978); Symposium, *A Symposium on Legal Scholarship*, 63 U. COLO. L. REV. (1992). Robert Clark, Harvard's current law dean, by implication, at least, admits it is the basic professional dynamic of being a "supply line" to the legal profession that shapes the bulk of the work of legal scholars.

The function of the law school as a supply line to the legal profession may suggest that law professors must carry out three kinds of tasks Finally (the third), as scholars, they should function as commentators: they should develop and publish new presentations of law—new compilations, simplifications, explanations, and criticisms—as called for by the constant stream of new developments in the real legal world. One may naturally question whether, within the constraints of time and means, they can do anything else.

Robert C. Clark, *The Interdisciplinary Study of Legal Education*, 90 YALE L.J. 1238, 1266 (1981).

What Clark describes is neither science nor anything even approaching pure intellectual activity. It is technique and professional assessment, nothing else. This does not mean it is unimportant, simply that it is not truly intellectual. American law faculty by and large are not true intellectuals or "lovers of wisdom." They are intellectual technicians who live off knowledge, not for knowledge. This phenomenon is discussed in RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 26 (1963).

²⁸ The task admittedly would have been extraordinarily difficult as well as in direct conflict with the overwhelming currents of *scientism*. Friedman sums up the problem:

None of the sciences were asking the *whole question*, *What is man?* Nor were they asking the *unique question*, *Who am I, in my uniquely human essence?* These are not smaller or more personal questions; they are larger and more comprehensive than the ones which science has been asking. They include a larger view of man, as well as a larger view

perceive the limits of the scientific methodology and its specific structure and content, as well as the obvious benefits to be gained from a systematic and empirically-based disciplining of the legal mind.

Langdell's failure to develop the content of his declaration about the scientific nature of law left many untrained and professionally inexperienced law school academics fumbling around within their discipline without a true intellectual methodology, bereft of real experience in the law and law practice, and with an exceedingly "thin" and artificially defined subject matter neatly arranged into discrete subdisciplinary compartments such as contracts, torts, property, estates and trusts and criminal law.²⁹ Justice was left out in the cold

of history. They include man's personal being—*my* personal experience and knowledge of myself—as well as my philosophical and scientific knowledge of what 'man is'. . . .

* * *

Science investigates man not as a whole, but in selective aspects and as part of the natural world. Scientific method, in fact is man's most highly perfected development of the I-It, or subject—object, way of knowing.

Maurice Friedman, *Introductory Essay to* MARTIN BUBER, *THE KNOWLEDGE OF MAN* 19 (1965).

²⁹ The law schools have done what the world of knowledge in general has pursued for considerably more than a century, refining the subject matter of specialized disciplines into increasingly microscopic areas of inquiry. This is the inevitable focus and byproduct of our particular version of the scientific method, one that takes physics and its effort to discern the basic building blocks and forces of the physical universe through focusing on incredibly tiny phenomena as its highest task, and of our *society of technique* that seeks to break all functions and knowledge into discrete, mechanistic units. This multiplies to incredible dimensions the sheer volume of knowledge, creating barriers that impede communication as researchers become focused completely on their individual unit of knowledge. Christopher Stone reflects this in his observation: "the real world [as well as the world of knowledge] has become so overwhelmingly beyond comprehension that [legal] scholars generally have abandoned trying to account for what is happening *out there* in favor, as the most they can hope for, of an account of what is happening among themselves." Christopher Stone, *From a Language Perspective*, 90 YALE L.J. 1153 (1981). Consequently, Stone concludes, "[W]e have detached into separate islands of activity, mutually isolated from many potentially unifying and beneficial dialogues." *Id.* at 1155. Two effects of the fragmentation are that we do not accurately comprehend the world we pretend to address, and our work becomes increasingly useless except within the internal confines of a closed discipline and highly specialized audience. An increasing sense among many legal scholars of what has happened explains why the more general work of Ronald Dworkin, John Finnis, Michael Perry, and John Ely has attracted such attention as we instinctively attempt to grasp at anything that promises to return to us the sense of unity and coherence. See, e.g., Andrei Marmor, *Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's*

while legal science, whatever it might be or could be, was not seriously pursued.³⁰

Given the dominant intellectual climate of the period, one that deified science as the new theology, we can, however, easily understand why justice was not a subject of interest and why "scientific" legal doctrine was.³¹ Jurisprudence for example was unscientific.³² Not only was it not scientific, it

Legal Theory, 10 LAW PHIL. 383 (1991). What I am calling the *fragmenting phenomenon* characterizes virtually the entire world of knowledge, not only law. It is ironic that many physicists are now re-expanding their discipline into almost metaphysical dimensions. As this occurs, the power of science as intellectual metaphor is still sufficient to pull other disciplines, including law and justice, along in its wake.

³⁰Law schools were not the only institutions undergoing such attitudinal changes in the nineteenth century. It was occurring throughout the social and intellectual systems. For a fascinating discussion of what was occurring and how specialization and the Germanic form of academic credentialism took over the American universities, including Harvard, see 7 PAGE SMITH, *AMERICA ENTERS THE WORLD* 841-54 (1985). One historian remarks on how this affected university perspectives:

The old professionalism was characterized by a serious regard for the liberal studies and by the degree to which the central subject of every liberal study was man himself. The new professionalism, on the other hand, studied things, raised questions not so much about man's ultimate role and his ultimate responsibility as it did about whether this or that was a good way to go about achieving some immediate and limited object.

FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* 342 (1964).

³¹Our naive attitudes about science have proven wholly inadequate. We have moved into a fragmentary existence in which people are striving to identify something in which to believe and on which to ground their values and actions. Buber describes the problem as one in which "[m]an is no longer able to master the world which he himself brought about." MARTIN BUBER, *BETWEEN MAN AND MAN* 158 (1965). An out-of-control combination of technique, economic forces and political movements is now in command, independent of our desires. This has never been more obvious than in the last election. Propaganda, empty symbolism, wave upon wave of distortions and lies filled our machinery of communication for months. And we are at a loss to know what to do. By ignoring principles of justice, right and wrong, and philosophical belief we have made ourselves weak and "stupid." We seek refuge from helplessness and personal responsibility by belonging to some group that believes in something passionately and in doing so seek to sustain ourselves with the unquestioned power of the collective passion of the herd of committed believers.

³²[I]n the nineteenth century . . . reason became separated from "emotion" and "will." The splitting up of the personality was prepared by Descartes in his famous dichotomy between body and mind For the late nineteenth-and early twentieth-century man,

was *metaphysical*, a term that by Langdell's time had come to have highly negative connotations. For scientists, such empty thoughts were of the realm of superstition and myth.³³ One of Langdell's first acts was to remove jurisprudence as part of the required course of study at Harvard. The practice of law was also unscientific and therefore suspect.³⁴ What was needed in Langdell's brave new world of scientific law was not law faculty experienced in practice but a completely new type of academic "scientist" untainted by exposure to the confusing and distorting world of law practice.³⁵ Enter the young James Barr Ames, Langdell's exemplar of the new legal scientist.³⁶

reason was supposed to give the answer to any problem, will power was supposed to put it into effect, and emotions—well, they generally got in the way, and could best be repressed.

MAY, *supra* note 11, at 44 (1953).

³³ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (for the description of Von Jhering's dream). The move away from metaphysics had begun even earlier in Europe as reflected in Kant's observation that:

Time was when she [metaphysic] was the *queen* of all the sciences; and, if we take the will for the deed, she certainly deserves, so far as regards the high importance of her object-matter, this title of honor. Now, it is the fashion of the time to heap contempt and scorn upon her; and the matron mourns, forsaken and forlorn, like Hecuba.

IMMANUEL KANT, CRITIQUE OF PURE REASON xiii (J.M.D. Meiklejohn trans. 1900) (Kant's Preface to the First Edition (1781)).

³⁴ "If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices." Christopher Langdell, *Address* delivered Nov. 5, 1866, *reprinted in* 3 LAW Q. REV. 123, 124 (1887). In the several years prior to Langdell's arrival, Harvard Law School was regarded as being in a period of decline. "No one took Harvard seriously" in those decades. It had become:

an essentially unscholarly place. Science . . . was no longer regarded as the object of study in a law school. The purpose of students of this time in the School, as well as in the later career of their generation at the bar, usually was practical and self-centered in the highest degree.

THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917 21 (1918).

³⁵ Langdell argued:

[A] man of mature age, who has for many years been in practice at the bar changes his habits with some difficulty. He has become used . . . to making himself a temporary specialist in a narrow field, and finds it hard to adapt his mind to the quite distinct profession of the teacher, whose field must be the whole law.

THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917, at 26 (1918) (quoting Christopher Langdell).

Paradoxically, and most hypocritically, the hidden agenda of legal education and scholarship has, since Langdell and until quite recently, been

III. THE ELUSIVE MEANINGS OF JUSTICE

It is obvious why Langdell and most other law faculty abhor the pursuit of justice in their teaching and research. While at theoretical levels of intellect and understanding "justice" appears an extraordinary challenge, it is in fact far more likely to produce arid or even contentiously silly debates than penetrating insight.³⁷ This is even more true in a system, such as the one we law faculty occupy, that lacks the tools and insights required to test its fundamental grounding principles; that is unaware or unable to admit it is even using deep metaphysical principles; and, in any event, lacks the courage or motivation to inquire because its practitioners and beneficiaries sense intuitively that the

driven not by science but by a peculiar orientation to a specific type of law practice. One critic writes, "[l]egal education has been primarily concerned with instilling lawyering skills, with training students to think like lawyers. This endeavor required emphasis on process over substance—on internalizing certain modes of reasoning rather than on the consequences of reasoning by these modes." Auerbach, *supra* note 5, at 458; UNEQUAL JUSTICE, *supra* note 3.

³⁶ See MEMOIRS OF JAMES BARR AMES, LECTURES ON LEGAL HISTORY 3, 5 (1913); and Christopher Columbus Langdell, in AMES, *id.* at 467, 471. The productivity of Langdell's "legal scientists" has been questioned.

For a hundred years, commentators [outside legal education] had been expressing surprise that despite the number of distinguished lawyers teaching in law schools, the output of scholarly literature was small. The collection and regurgitation of doctrine might have seemed scholarly to Langdell; it did not impress those in other disciplines in the twentieth century.

LEGAL EDUCATION IN AMERICA, *supra* note 27, at 16. Of course, another perspective is that, whatever the flaws of American legal scholarship, and they were many, the criticisms fail to understand the inherent differences between our task and how the critics from other disciplines conceive their own roles. There is a true renaissance unfolding in legal scholarship that is likely to result in a new intellectual discipline if it continues. This was the focus of my article *Prophets, Priests and Power-Blockers* in its analysis of legal thought and knowledge as a rich form of practical knowledge. See *supra* note 14.

³⁷ After all, how many angels *can* we fit on the head of a pin? Because justice is based on values and areas of inquiry that we have never learned to develop, either substantively or methodologically, our discussions become circular or easily reducible to personal preferences without adequate grounding in theory or reality. See, e.g., EUGENE FREEMAN & DAVID APPEL, THE WISDOM AND IDEAS OF PLATO (1963). We tend to rail at one another with propagandistic slogans and engage in superficial posturing rather than in serious efforts to communicate. Masao Abe refers to the need for foundational knowledge and describes the failure to recognize this fact as "the cul desac of thinking." MASAO ABE, ZEN AND WESTERN THOUGHT 118 (William LaFleure ed., 1985). We take our initial premises for granted, tacitly sharing those of the particular group of which we are a part, rarely identifying or challenging our own unarticulated and inarticulate premises.

answers they might obtain would almost inevitably be ones requiring fundamental change or, if we refuse to change, recognition of the dimensions of our ongoing intellectual and political hypocrisy.³⁸

We are far less committed to truth in the academic world than we pretend, and are exceptionally skilled at tacit awareness of where arguments will ultimately lead. The skill of avoiding potentially troubling lines of inquiry and consequence is highly developed among law faculty. Without even having to make the process conscious, which would reveal its flaws and inconsistencies, we short-circuit our own chains of logic and analysis in order to protect ourselves from truth. We choose to live within our own version of what Medieval theologians called *the cloud of unknowing*.

When politics, law and justice are involved, we go to great lengths to protect what one writer has called our "fragile fictions."³⁹ This may be necessary politically but is profoundly dishonest if our goal is full understanding and awareness of the nature and conditions of the reality we inhabit.⁴⁰

³⁸ See MASLOW, *supra* note 22. Maslow offers a lucid and penetrating analysis of this phenomenon. *Id.* See chapter 5 of MASLOW, titled *The Need to Know and the Fear of Knowing* *supra* note 22, at 60-67, in which he discusses such themes as "Fear of Knowledge: Evasion of Knowledge: Pains and Dangers of Knowing," and "The Avoidance of Knowledge as Avoidance of Responsibility." He concludes:

Knowledge and action are very closely bound together, all agree. I go much further, and am convinced that knowledge and action are frequently synonymous, even identical in the Socratic fashion. Where we know fully and completely, suitable action follows automatically and reflexly. Choices are then made without conflict and with full spontaneity.

[T]his close relation between knowing and doing can help us to interpret one cause of the fear of knowing as deeply a fear of doing, a fear of the consequences that flow from knowing, a fear of its dangerous responsibilities. Often it is better not to know, because if you *did* know, then you would *have* to act and stick your neck out.

Id. at 66.

³⁹ See ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2nd ed. 1971).

⁴⁰ Humanity's struggle now, if it is to survive, is to reexamine its experience in the world and come to some deeper understanding of the way civilizations reduce the vividness and range of human experience by confining it to a linguistic system and conceptual metaphors that take charge as individuals come of age.

Nolan P. Jacobson, *A Buddhist Analysis of Human Experience*, in KENNETH K. INADA & NOLAN P. JACOBSON, *BUDDHISM AND AMERICAN THINKERS* 38 (1984). See Jacobson's discussion of the "linguistic bind" in which Western culture has been trapped, including his observation that:

People come of age in the keeping of a linguistic system which is constantly used to affirm the limits of language and experience. They are brought up complete strangers to the task of freeing life in

Understanding and awareness, however, are often not our true goals. Rather than confronting our dishonesty and limits, we constructed a *scientistic* orthodoxy that ignored the reality of law and its integral relationship with justice for more than a century.

Although we have been of some service to the judiciary and to the more powerful and prestigious segments of the practicing bar, we have otherwise behaved in one of the most anti-intellectual and unaware ways possible, much of our work being, until recently, little more than apologetics for the implicit terms of the status quo.⁴¹ Given the political and social changes we have experienced in the last twenty-five years, however, we have reached a critical moment at which we are experiencing great stress and turmoil as new and diverse generations of scholars have flooded into the law schools with radically different political and intellectual agendas.

This phenomenon of conflict and commitment to achieving specific visions of the public interest is being played out at the more applied levels of contested political justice that we are now experiencing in many law schools. One of the more troubling characteristics of the process is that we insist on labeling everything. We are not comfortable unless we can assign someone or something to a pigeon hole. Everyone and everything is being dehumanized.

Our writing does not begin with our humanity but with our *whiteness*, *blackness*, *brownness*, *maleness*, *femaleness*, *sexual preference*, or *social class*. We have generated an inhuman process of critique and anti-communication that is blinding us. No truly worthwhile political or intellectual community can be sustained if we do not learn that justice begins with our ability to perceive others as uniquely human, as persons who may have additionally relevant characteristics due to their sex, background, preference or race, but whom we must first see as a person. This is what is missing from virtually all our dialogues, or perhaps more accurately, our diatribes.

Because of this dehumanization through stereotypes and propaganda, explicit or implicit assertions grounded on beliefs about fairness in treatment of rich *and* poor, men *and* women, black *and* white, abled *and* disabled,

its total ecosphere from the serpentine reductive coils that separate them from different ethnic, tribal, racial, linguistic and religious groups and thus bar them effectively from joining the community of mankind. *Id.*, at 42-45.

⁴¹ See, e.g., James Schlesinger's comment on the responsibility of the modern intellectual as understood by Hans Morgenthau:

The intellectual . . . seeks truth; the politician, power. And the intellectual . . . can deal with power in four ways: by retreat into the ivory tower, which makes him irrelevant; by offering expert advice, which makes him a servant; by absorption into the machinery, which makes him an agent and apologist; or by "prophetic confrontation".

James Schlesinger, *Intellectuals' Role: Truth to Power?*, WALL ST. J., Oct. 12, 1983, at 28.

heterosexuals *and* those with other sexual preferences, very often do not reflect reasoned intellectual debate upon which the increasingly diverse members of a political community can ground critical rules.⁴² Rather, we have a process in which advocates who are already convinced of the rightness of their position and the wrongness, not only of opposing views but even views that fail to be fully aligned with their own,⁴³ seek through aggressively formulated positions on what is politically correct to impose standards and apply sanctions.⁴⁴ The

⁴² Our refusal to deal honestly with the realities of law, society and intellect reflects Aristotle's awareness that "man, when perfected is the best of animals, but, when separated from law and justice, he is the worst of all; . . ." ARISTOTLE, *Politics*, *supra* note 16, at bk. I, ch. 2. Right now it cannot be said we are the best of animals. What little progress we appeared to have made over two centuries is fast slipping away. This is in part because the distributional consequences of accepting a particular position are increasingly high. We are using intellectual arguments for political purposes in efforts to retain or obtain power and privilege. Legal scholars and the special interest groups served by law are conducting politically motivated intellectual guerrilla wars. Rather than the desire to know, we are driven by the desire to achieve and dominate. The process is similar to that of "faultfinding" which Hoffer describes in ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* (1963). There is a fundamental dishonesty and irresponsibility to much of our purportedly intellectual work.

⁴³ We are never satisfied. Since many legal scholars are deeply committed to intensely felt political agendas, they seem to share the activist slogan, "if you are not part of the solution, you are part of the problem!" Such attitudes leave little space for balance, compromise or centrism. This is reflected in Aristotle's observation:

The universal and chief cause of . . . revolutionary feeling [is] . . . the desire of equality, when men think that they are equal to others who have more than themselves or, again, the desire of inequality and superiority, when conceiving themselves to be superior they think they have not more but the same or less than their inferiors.

ARISTOTLE, *Politics*, *supra* note 16, at bk. V, ch. 2.

⁴⁴ Despite our pretensions we have never been very tolerant. Political correctness demands allegiance and adherence to a party line whether the ideology is described as liberal or conservative. Such intolerance is a predictable outgrowth of power, whoever wields it. "Liberalism . . . immediately denied freedom to those who disagreed with it." JOHANNES HIRSCHBERGER, *A SHORT HISTORY OF WESTERN PHILOSOPHY* 128 (1977). A recent example of this intolerance involved Robert Casey, Governor of Pennsylvania, who though himself a liberal (even though this should be irrelevant), was prevented from giving a speech entitled "Can a liberal be pro-life?" at a prestigious public forum. Casey had been prevented from presenting his views several months earlier at the Democratic national convention. See David E. DeCrosse, *Pro-life Liberal Silenced Again*, PLAIN DEALER (Cleveland), Oct. 13,

law school world is an impassioned hothouse of true believers unwilling or unable to communicate.⁴⁵ These true believers are seeking outcome, not understanding, power, not truth.⁴⁶ In so doing they have dehumanized not only those they attack, but themselves.

This situation is caused in part, just as the repressive and unaware fanaticism practiced by advocates of the status quo,⁴⁷ by the angry and aggressive fanaticism of zealotry which always lies barely suppressed within the advocates of all causes, particularly the most just causes. At some point there is an inherent dishonesty in the processes of rhetoric and advocacy. It often creeps in on *catfeet*, subtle and devious, and we are left consciously unaware of our own deviance. It also falls prey to Machiavellian rationalizations, ones we allow ourselves because if we bother to think about it, we *know* the distortion is justified by the good ends we seek, the "badness" of those who oppose us, or the competitive need to "win."

This is the advocate's inevitable curse, one intensified by the advocate-scholar's acceptance and internalization of the belief in the cause being advanced.⁴⁸ Political advocacy based on selected principles of justice is

1992, at B7. This rising phenomenon of intolerance gives renewed meaning to Madison's warning voiced in the quote with which this article is introduced.

⁴⁵"[T]he faultfinding man of words, by persistent ridicule and denunciation, shakes prevailing beliefs and loyalties, and familiarizes the masses with the idea of change." HOFFER, *supra* note 42, at 127.

⁴⁶Obviously the contest is for political power. The law is the new battleground and some think that people who make important descisions actually take the time to read what we write. With rare exception the scholarship of law faculty has little effect on fundamental, as opposed to technical, concerns. This point was made in Paul D. Carrington, *Aftermath*, in ESSAYS FOR PATRICK ATIYAH 114 (Peter Cane & Jane Stapleton eds. 1991).

⁴⁷Those in power are at least as repressive and fanatical in maintaining their power as those who attack them or even those whose ideas are simply a little different. Persons in control of the instruments and institutions through which power is applied, and rewards and sanctions distributed, are simply able to be less obvious and more subtle in their behavior. Of course, they can become quite ruthless if the more subtle mechanisms of control do not work. See HOFFER, *supra* note 42: "There is a moment in the career of almost every fault-finding man of words when a deferential or conciliatory gesture from those in power may win him over to their side. At a certain stage, most men of words are ready to become timeservers and courtiers." *Id.* at 121-22.

⁴⁸The attitude of zealotry is that of passionate belief. The intensity is often transferable from one closely held belief to another. See HOFFER, *supra* note 42. Hoffer offers the insight: "[All] mass movements are interchangeable. One mass movement readily transforms itself into another. A religious movement may develop into a social revolution or a nationalist movement; a social revolution, into militant nationalism or a religious movement; a nationalist movement into a social revolution or a religious movement." *Id.* at 26.

both more dangerous and subjectively intense than advocacy pursued on behalf of clients.⁴⁹ Lawyers are trained to understand the importance of dispassion and objectivity in providing representation to our clients. We understand that if we identify too closely with our clients we lack the ability to evaluate truth and untruth, significance and meaninglessness, distortion and deviation. We have never been trained in law school to apply this same understanding to our own scholarship.

Intellectually based advocacy now prevalent in much of legal scholarship blurs the lines of judgment and objectivity.⁵⁰ Rather than freeing our minds, movements capture and repress the quality and scope of our thought, influence our intellectual honesty and inhibit our awareness. We actually *see* the world through the movement's eyes rather than our own. This is the danger of bringing justice into our work at levels other than the most general and theoretical. We must learn to do it without sacrificing truth and balance. I in no way pretend in writing this that I know how to do it. I do know that surrendering one's intellect to a movement, even those with which I share deep beliefs, is not the way to achieve true clarity of vision and knowledge. It does, however, generate power and this is the dilemma and choice faced by the activist-scholar. Of course, traditional scholars are just as confined within the blinding framework of their orthodoxy and its unchallenged assumptions and methods.

These activist scholars are not untruthful but their perspectives are heavily influenced by deeply felt experiences and their internalization of the values, agendas and desired consequences of a particular political cause.⁵¹ The line

⁴⁹"Legal scholars are more than theorists of law; we are active agents *in* it as well." Stone, *supra* note 29, at 1173. The danger is that active agency produces subjectivity, and the more intense degrees of subjectivity and commitment easily lead to distortion and intellectual blindness. Belonging to a particular movement, scholarly ones included, immediately imposes limits on what the scholar says and defines the world beyond the movement, which will reduce the ability to engage in critique of either self or the core assumptions of the movement.

⁵⁰Part of the problem is that most of us know we really don't know what we are talking about. Consequently, even legal philosophers seek refuge behind the apparent safety of formalistic systems that sound wonderfully precise but actually say very little. HOFFER, *supra* note 42, at 121, concludes: "There is apparently an irremediable insecurity at the core of every intellectual, be he noncreative or creative. Even the most gifted and prolific seem to live a life of eternal self-doubting"

⁵¹Hobbes described six factors that lead to the dissolution of a political community. See THOMAS HOBBS, *THE LEVIATHAN*, reprinted in GEORGE CHRISTIE, *JURISPRUDENCE* (1973) [hereinafter HOBBS, *LEVIATHAN*]. These factors include:

1. That every private man is Judge of Good and Evill actions
2. That whatsoever a man does against his Conscience, is Sinne; . . .

between that which they study and critique, their experience and even their definition of self is intermingled, overlapping and entangled. Nor are these scholars necessarily wrong, but they are subjective and that subjectivity must inevitably influence any fair interpretation of their work and of the positions which they espouse in their teaching and scholarship. This same phenomenon operates, albeit more subtly, in the work of the more traditional scholars who have matured within a dominant orthodoxy, and fully accept its terms.

This problem is exacerbated because many of the most aggressive law faculty are those who represent an internalized, personally experienced dimension of injustice. This means they are at least in part gripped subjectively within the data field upon which they are commenting. This is dangerous for individuals, but when this becomes part of a movement, the intellectual independence and neutrality essential to truth are at great risk.⁵²

Some other highly critical law faculty, on the other hand, have had little experience with the conditions of reality and law practice. Consequently, their critiques are flattened and tend to exude an aura of unrealness. In either context, the middle ground generated by an understanding of human and political reality of the kind that can be gained only through experience is too often missing from the analyses.⁵³ This was the part of the intellectual equation Langdell failed to understand, or explicitly rejected. Of course, so did those in the other scientific disciplines, so at least Langdell is among respectable company.

The problem of perspective and balance is worsened in the law schools because justice is an energy that burns hot. Seeking the substance of justice and

-
3. That Faith and Sanctity, are not to be attained by Study and Reason,
but by supernaturall Inspiration or Infusion . . .

Id. at 347.

⁵²"[M]odern man is beset by anxiety and a feeling of insecurity. He tries to adapt to changes he cannot comprehend. The conflict of propaganda takes the place of the debate of ideas." THE TECHNOLOGICAL SOCIETY, *supra* note 11, at vii. See also JACQUES ELLUL, PROPAGANDA (1965).

⁵³Aristotle suggests the importance of experience, understanding and judgment in explaining why the young may excel at speculative or mathematical thought but are not thought of as possessing wisdom. "[W]hile young men become geometricians and mathematicians and wise in matters like these, it is thought that a young man of practical wisdom cannot be found. The cause is that such wisdom is concerned not only with universals but with particulars, which become familiar from experience. . . ." ARISTOTLE, *Politics*, *supra*, note 16, at bk. 6, ch. 8. Practical wisdom is central to what law faculty do, and this requires experiencing reality in sufficient doses to be able to understand its measures and implications. Again, however, I want to emphasize that this means only that the work of many legal scholars may need to be examined and reinterpreted through the insights of experience, not that the work cannot be important within its own limits.

injustice can therefore become a dangerous exercise.⁵⁴ The closer our specific perceptions of justice and injustice come to political and social reality, the more intense and searing the flame.⁵⁵ There is a price to be paid when questions of justice are brought into the university law school, just as there has long been one exacted for failing to do so.⁵⁶ We must be extremely careful about how we focus on the concerns of a just law and legal system.⁵⁷ It must be done fairly,

⁵⁴ It is dangerous because true inquiry into justice will almost inevitably involve a critique of injustice and the existing system of power. Since universities are bound intimately to the dominant institutions of society, regardless of our rhetoric, a justice-based critique will offend. Those who offend risk being the object of sanctions and the consequences of their attempts to reveal the truth. Most, including law faculty, take the much safer path of prudence. This is reflected in Berger's observation that, "[o]ne moves within society within carefully defined systems of power and prestige. And once one knows how to locate oneself, one also knows that there is not an awful lot that one can do about this." PETER BERGER, *INVITATION TO SOCIOLOGY* 66 (1963). Even more telling is Berger's conclusion that most of the time we do not want to do anything about the condition.

⁵⁵ Jacques Ellul writes:

[P]ropaganda seeks to induce action, adherence, and participation—with as little thought as possible. According to propaganda, it is useless, even harmful for man to think; thinking prevents him from acting with the required righteousness and simplicity.

An example that shows the radical devaluation of thought is the transformation of words in propaganda; there, language, the instrument of the mind, becomes "pure sound," a symbol directly evoking feelings and reflexes.

[This creates a] dissociation between the verbal universe in which propaganda makes us live, and reality.

PROPAGANDA, *supra* note 52, at 180.

⁵⁶ Ruth Anshen concludes: "[M]an is that being on earth who does not have language. Man is language." RUTH ANSHEN, *LANGUAGE: AN ENQUIRY INTO ITS MEANING AND FUNCTIONS* 3 (1983). Given what we are saying about how devotedly we have gone about avoiding the language of justice, fairness, injustice, right and wrong and the like, it is arguable that the "language" of man, or human, individually and collectively, is a much too thin and limiting dialect. If our substantive being is defined by the richness of our concepts, and what might be called the deep linguistic structure by which we create much of what we are as humans, then when it comes to justice we are still babbling with pidgin-English and sign language.

⁵⁷ Jacques Ellul defines the outcome of a dehumanized society as one in which the individual will no longer be able, materially or spiritually, to disengage himself from society. *THE TECHNOLOGICAL SOCIETY*, *supra* note 11, at 139.

openly and systematically, something increasingly absent from our impassioned polemics. Law faculty must ask what is unique about the law itself. Law faculty must also ask what is significant about the processes, structures, and instruments through which the law is applied and created. What is it in legal education, the legal profession or the judiciary, that is related to, helps to achieve or subvert, or in some way works to affect ideas of justice.⁵⁸ What are the justice-oriented questions that, even if ultimately unanswerable, nonetheless illuminate our dialogues and judgments?⁵⁹ The most fundamental question, however, is that which begins from within each of us. Rather than *externalizing* justice, we must begin to *internalize* it, seeking in the process to better understand our natures and our ideals. We must begin within ourselves and define a new, post-Langdellian ideal that rejoins the schism that his methodological suppositions helped to generate.⁶⁰

One of the main difficulties with pursuing justice only at theoretical levels is that it means and can be made to mean many different things in a wide variety of contexts.⁶¹ Is justice, for example, a mystical, magical grail that has touched the lips of God, or is it a kind of intangible life-giving substance equivalent to water, air, food, etc., without which we humans cannot survive?⁶² On one level, for example, justice is cosmic, the very mind or motive force of the universe or God, or emanations from the pattern of deep principles em-

⁵⁸ "Explicit consideration of what the nature of legal institutions might be in a just society remained *terra incognita*." *Teaching of Law*, *supra* note 5, at 461. If we cleverly avoid considering the hard questions, we avoid confronting power and the limits of our own knowledge.

⁵⁹ "[T]eaching may make explicit those considerations of justice that . . . institutions instinctively prefer to keep implicit and silent." *Teaching of Law*, *supra* note 5, at 471.

⁶⁰ See discussion *infra* part X.

⁶¹ The concepts of justice are hypothetical, and no part of justice is self-evidently just but may always be called upon to justify itself. The role of particular, clear, and distinct values, ends, and standards is to guide and illumine judgment incrementally, but in constantly occurring and important phases of legal judgment, justice is problematic.

EDWIN GARLAN, *LEGAL REALISM AND JUSTICE* 125 (1941).

⁶² In this view, if we fail to accept our impulse to do justice, we are like the wretched souls Dante described: "This miserable fate suffer the wretched souls of those, who lived without or praise or blame, with that ill band of angels mix'd, nor who rebellious proved, nor yet were true to God, but for themselves were only." DANTE ALIGHIERI, *INFERNO* 14 (Paddington Press 1976).

bedded by our Creator in the structure of existence.⁶³ On another level, justice can be seen in the choice to cut a two-thousand year old Sequoia, converting it from a living, stately giant to an inanimate board feet of lumber, or the willingness to extinguish a species of owls due to our own failure to plan sustainable economic activity.⁶⁴

How is justice realized on the level of specific acts or omissions between individual entities or groups, and, as the example of the Sequoia impliedly asks, is sentence a necessary condition of the existence and definition of justice? Are humans part of a natural order in which justice is a wide and richly textured value and force integral to all elements of our universal reality, or is justice only a matter of the specific affairs of the human species relevant in relation to human concerns and interactions?⁶⁵ I ask these particular questions because Aristotle described justice as "the highest virtue," arguing that the special essence of justice is that it exists not only for ourselves but in relation to how we behave toward others.⁶⁶

⁶³ A fundamental principle was articulated by Thomas Hobbes in a statement that clearly reflects a belief in natural law, God, Reason, and the Golden Rule. "The Laws of Nature therefore need not any publicity, nor Proclamation; as being contained in this one sentence approved by all the world, *Do not that to another, which thou thinkest unreasonable to be done by another to thy selfe.*" HOBBS, *LEVIATHAN*, *supra* note 51, at 340 (emphasis added).

⁶⁴ We positivists tend to manufacture our justice as an anthropomorphic phenomenon. This puts humans at the Judeo-Christian center of the universe in which God created everything to serve our needs. As environmentalists know, this concept is not only indefensibly arrogant, but has had destructive effects on humans as well as the species we ruthlessly exploit. *See, e.g., J. Baird Callicott, La Nature est morte, vive la nature!* 22 HASTINGS CENTER REP. 17 (1992); JOHN A. PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE* (1974).

⁶⁵ "Let us assume then that the best life, both for individuals and states, is the life of virtue, *when virtue has external goods enough for the performance of good actions.*" ARISTOTLE, *Politics*, *supra* note 16, at bk. VII, ch. 2 (emphasis added). *See also* ARISTOTLE, *Nichomachean Ethics*, in 2 THE WORKS OF ARISTOTLE (W.D. Ross trans., 1952) [hereinafter ARISTOTLE, *Nichomachean Ethics*]. Bringing everyone into a position of adequate resources and social "goods" that allow the possibility of human flourishing is a fundamental condition of justice, or ought to be, regardless of one's politics. *See, e.g., D'Amato & Chopra, supra* note 3.

⁶⁶ "This form of justice, then, is complete virtue . . . in relation to our neighbor. And therefore justice is often thought to be the greatest of virtues, and neither evening nor morning star is so wonderful; and proverbially in justice is every virtue comprehended." Aristotle, *Nichomachean Ethics*, *supra* note 65, at 58. "And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also . . ." *Id.* "[J]ustice, alone of the virtues is thought to be 'another's good,' because it is related to our neighbors; for it does what is advantageous to another." *Id.* For

IV. JUSTICE AS CHOICE

Whether we ask such questions about the meaning and nature of justice, how we ask them, and how we choose to answer them are critical considerations. How we demonstrate the validity of the answer is equally critical.⁶⁷ This is because the particular answers we choose about the origin, nature and content of justice help define the conditions and terms of society that we are likely to consider legitimate.⁶⁸ What the Langdellian legal scientists and most law faculty since then have failed to understand or sought to ignore is that we still make covert choices about the answers to these questions, consciously or unconsciously, choately or inchoately.⁶⁹

We *must* make these choices. To refuse to choose is inevitably itself a choice. We cannot escape them in our reasoning and decisions as judges, lawyers, legislators, law professors and citizens because they are the grounding principles of our decisions and doctrines.⁷⁰ We can pretend that the choices

an assessment of how difficult it has been for us to apply this concept see, ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY OF MORAL THEORY* (1984), particularly chapter 17, *Justice as a Virtue: Changing Conceptions* at 244.

⁶⁷To the extent the efforts of the Legal Realists had begun to push law schools in this direction, World War II stalled their momentum. Jerold Auerbach suggests that after the war, and in the troubling context of Korea, Cold War politics and McCarthyism, "[t]he only recourse was a retreat to legalism, craft, and reason, the distinctive contribution of postwar educational theory." *Teaching of Law*, *supra* note 5, at 462 (footnote omitted).

⁶⁸One of the most fundamental premises is that of equality. It has been with us for awhile and we still argue about its meaning and limits. "All men think justice to be a sort of equality; . . ." ARISTOTLE, *Politics*, *supra* note 16, at bk. III, ch. 11 (28). But Aristotle never sought to develop this aspect of his political theory, instead showing the many problems with the abilities of real societies being able to resolve the equation of equality and the often competing principle of merit. This, of course, is one reason the extremely practical Aristotle described judges as the critical mechanism for restoring a disturbed balance, or proportion, and equality through their judgments.

⁶⁹[T]he mystery—of law in modern society . . . [is] how [to] retain any belief in the immanence of law, in its superiority to our individual, temporary needs, after we have adopted a whole-hearted modern belief in its instrumentality? How continue to believe that something about our law is changeless after we have discovered that it may be infinitely plastic? How believe that in some sense the basic laws of society are given us by God, after we have become convinced that we have given them to ourselves.

DANIEL BOORSTIN, *THE DECLINE OF RADICALISM* 75-76. (For Boorstin's description of how we have resolved this dilemma, see *infra* note 71.)

⁷⁰"All we can do by reasoning is to learn that if our first assertion is true, then all the implications, which follow from it according to the laws of valid reasoning, must also be true. But the laws of reasoning are silent concerning

were part of the historical social contract, derived from a non-existent state of nature or hypothetical original position, dependent on scientific principles, human nature, or God. We invent such legitimating constructs because we need something larger than ourselves on which to ground our political systems.⁷¹ This is because we are afraid to face the reality of our rather violent and nasty selves and the responsibility the freedom of choice imposes.⁷² Our fictions are less an indication of our lack of knowledge or of our ability to understand than they are an indication of our fear of the implications and consequences of the truth. We fear telling the emperor he is naked.

The truth is far simpler than we pretend. The truths of justice are within us. The only certainty is that we are the responsible center of our political, legal and moral universe. It is a troubling and existentialist truth, but we can demonstrate the validity of nothing else. At a minimum, therefore, we must accept that it is our responsibility to understand that we are the architects of

the truth the truth of the crucial first premise." FREEMAN & APPEL, *supra* note 37, at 71. A book just published by Cambridge University Press applies what the authors call the "attitudinal model" for evaluating the decisions of the U.S. Supreme Court. Jeffrey Segal and Harold Spaeth use the U.S. Supreme Court Data Base to examine all phases of the Court's decision-making processes, allegedly being able to predict the Court's behavior with a greater degree of accuracy than with what is called the "legal model" of analysis. The authors' premise is that the Justices of the Supreme Court make their decisions based on attitudes and values, not the "plain meaning" of language, the alleged intent of the Framers of the Constitution, or precedent. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1992).

⁷¹ Daniel Boorstin describes the need for a legitimating principle:

The discovery, or even the belief that man could make his own laws, was burdensome . . . [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater no greater than their own.

BOORSTIN, *supra* note 69, at 73.

* * *

For us, the idea of a constitution—a fundamental law which in some strange way is less changeable than the ordinary instruments of legislative—has had a peculiar therapeutic attraction. . . . We retain an incurable belief that constitutions are born but not made. . . .

Id. at 88.

⁷² Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons.

THE FEDERALIST NO. 15, at 96 (Alexander Hamilton) (Jacob E. Cooke, 1961).

justice. Therefore, the quality and intensity of justice emerges from within us. We choose, we accept, we generate the principles of justice not only as atomistic individuals, but as a community of humans committed to a positive vision of a just society. We choose the fundamental terms.

Private property, for example, is nothing more nor less than a proposition containing an implicit assertion about the just, fair, and necessary conditions of society.⁷³ It is, of course, also a justification for keeping what one has seized. The minimalist state, such as forms the basis of Robert Nozick's philosophy, is also a major statement about what is just⁷⁴ and a way of keeping what one has seized. So is the Marxist principle of "from each according to his ability, to each according to his need."⁷⁵ This principle not only allowed a complete restructuring of ownership and property rights, legitimating an enormous abuse of power, it simultaneously served as a justification for seizing more. Each principle is an implicit claim about such fundamental matters as human nature, the appropriate functions of government, and the validity of distributions of rights, privileges and resources.⁷⁶ Each is also a principle of empowerment and of human nature. Private property, the "free market," the minimal state, and Marxism are potent metaphysical preconditions that, once

⁷³ The first man, who after enclosing a piece of ground, took it into his head to say, "This is mine," and found people simple enough to believe him, was the true founder of civil society. How many crimes, how many wars, how many murders . . . would that [other] man have saved the human species, who pulling up the stakes or filling up the ditches should have cried to his fellows: Be sure not to listen to this imposter; you are lost if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody!

JEAN JACQUES ROUSSEAU, A DISCOURSE UPON THE ORIGIN AND THE FOUNDATION OF THE INEQUITY AMONG MANKIND 202 (Vol. 34 Harvard Classics edition, Charles W. Eliot ed., 1980).

⁷⁴ See ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1976). Such works can muster arguments about why such a system is preferable to others, but cannot prove anything about the basic principle used to ground the preferred system, yet we recycle these ideas each generation, cloaking them in new clothes that attempt to mask the lack of a foundation. It is as Maxine Green describes, *infra* note 75.

⁷⁵ "Ancient images, abstractions, and slogans too often hang like veils . . ." TEACHER AS STRANGER, *supra* note 10, at 80. See ALLEN E. BUCHANAN, MARX AND JUSTICE: THE RADICAL CRITIQUE OF LIBERALISM (1982).

⁷⁶ "The stereotype, which is stable, helps man to avoid thinking, to take a personal position, to form his own opinion." Ellul speaks of stereotypes and symbols as involved in a process in which, "[p]ropaganda gives the individual the stereotypes he no longer takes the trouble to work out for himself; it furnishes these in the form of labels, slogans, ready-made judgments. It transforms ideas into slogans, and by giving the "word", convinces the individual that he has an opinion." See ELLUL, *supra* note 52, at 163-64.

chosen, lead inevitably to distinct positions concerning what is just. They are devices of power and legitimation and, as such, ones of justice and injustice. Regardless of our attempts to reject such first principles, whether we label them metaphysics or natural law, they are inescapable. Our responsibility as active scholars is to penetrate to their fundamental assumptions, their truth conditions and their real consequences.⁷⁷

Like the rancorous arguments over original intent and the appropriate methods of judicial interpretation of the Constitution, not one of these metaphysical propositions can be proved as opposed to believed in or chosen.⁷⁸ I can argue, assert premises and attempt to muster supporting evidence, give my belief or opinion,⁷⁹ speak more or less eloquently about my positions, collect examples that seem to make the best sense, and find the statements of

⁷⁷This is why we struggle so aggressively over ideas such as the right to privacy and economic efficiency in a non-existent free market. Privacy either limits state intervention or justifies desired behavior. A reliance on efficiency and wealth creation as a meta-value allows the rejection of others' values. Each has profound implications.

⁷⁸Rousseau commented on the metaphysical dilemma of logic, in which regardless of how precise and meticulous the methodology, there must be an initial premise on which to ground the chain. In philosophy, law, and justice the chains have often been grounded on sand. Rousseau admits, "The philosophers, who have examined the foundations of society, have, every one of them, perceived the necessity of tracing it back to a state of nature, but not one of them has ever arrived there." ROUSSEAU, *supra* note 73, at 168. For an assessment of Rousseau's use of the concept of the state of nature see Scott, *supra* note 19. See also GEORGE A. AKERLOF, AN ECONOMIC THEORIST'S BOOK OF TALES (1984), making a similar observation about economic thought.

⁷⁹"The fact that reasonable men may differ in their judgments does not imply that they are merely expressing some personal preference or a mere groundless opinion. It implies only that the subject matter of their views is appropriate for judgment rather than knowledge." THOMAS GREEN, THE ACTIVITIES OF TEACHING 178 (1971). Edmond Cahn quotes approvingly the use of a judge's educated sense of right and wrong in the process of deciding cases, observing that "many influences [including unthinking judges] have combined to obscure the soundness of . . . Gray's analysis." Gray's position is that:

We all agree that many cases should be decided by the courts on notions of right and wrong, and of course everyone will agree that a judge is likely to share the notions of right and wrong prevalent in the community in which he lives; but suppose in a case where there is nothing to guide him but notions of right and wrong, that his notions of right and wrong differ from those of the community,—which ought he to follow—his own notions, or the notions of the community? . . . I believe he should follow his own notions.

EDMOND CAHN, THE MORAL DECISION 302 (1955) (quoting JOHN CHIPMAN GRAY, THE NATURE AND THE SOURCES OF THE LAW 287 (2d ed. 1921)).

others that strike me as compelling.⁸⁰ I cannot, however, *prove* the nature, content and functions of justice, as opposed to *choosing* and *justifying* those which make the most sense to me.

Even Aristotle's descriptions of justice, which I often use, or Rawls's closely related idea of justice as fairness, do not provide answers as opposed to ammunition in support of our particular choices.⁸¹ They are only more or less well-reasoned rhetorical arguments about which I can make choices. Stripped down to basics, therefore, our views about justice and injustice are *belief systems*, some of which compete with each other, particularly at applied levels of action, each representing a set of values that has been inculcated within us at some point by parents, teachers, peers, experiences, churches, readings, television, etc. We learn the values and internalize them to be brought out when we need them.⁸²

This does not mean that the impulse to justice, or God, or food, sex, territoriality and dominance do not emerge from genetically imprinted characteristics of the human species as a reasonably sophisticated animal. It seems obvious that our basic biological nature does have much to do with our behavior. But admitting that to be a valid point by itself establishes almost nothing other than that we should seek to understand these characteristics better and should take them into account in setting our limits. We may be able to ground arguments for justice in such things as genetic urges and species preservation, in animalistic tendencies toward aggression, territoriality and

⁸⁰One such fundamental principle is equality. "[E]quality is of two kinds, numerical and proportional Men agree that justice in the abstract is proportion, but they differ in that some think that if they are equal in any respect they are equal absolutely" ARISTOTLE, *Politics*, *supra* note 16. See also, e.g., AKERLOF, *supra* note 78. "Since the publication of *The Wealth of Nations*, economists have built an entire profession on a single powerful theory of human behavior based on a few simple assumptions." *Id.* at 123.

⁸¹See generally the discussion of justice and injustice in ARISTOTLE, *Nicomachean Ethics*, *supra* note 65, at bk. V. This includes *particular* justice which is separated into *distributive* and *rectificatory* justice, with *distributive* justice concerned with "distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution . . ." and, "one is that which plays a rectifying part in transactions between man and man." *Id.* at bk. V, ch. 2.

⁸²How this works has been explained with exceptional clarity by Thomas Green: "Every mind is fettered at some point, ridden with presuppositions and stereotypes that stand in the way of mental freedom." GREEN, *supra* note 79, at 51. "[A] person may hold a belief because it is supported by the evidence, or . . . may accept the evidence because it happens to support a belief he already holds." *Id.* at 48. "It is possible to hold conflicting sets of beliefs as psychologically central because we tend to order our beliefs in little clusters encrusted about, as it were, with a protective shield that prevents any cross-fertilization among them or any confrontation between them." *Id.* at 47.

social clustering.⁸³ Such characteristics are not entirely irrelevant. But if we are being honest with ourselves, these characteristics do not tell us very much about what is just but tell us more about the traps and limits that our innate biological factors create and impose.⁸⁴ These ideas may explain something about why we tend to behave in ways we consider unjust and vicious, or why we fear or punish those not of our "herd" or tribe. They will not establish, however, the conditions of a system that most of us would want to describe as just.

Arguments about justice that derive from biological factors and innate drives and characteristics are necessarily incomplete. Each represents only a small part of what we would have to know in order to understand the workings of a potential construct of justice. Even then they would be inadequate, and to some extent dangerous, because they would not be able to take into account the special architecture of a just society that we would choose to create rather than the consequences of an unjust society appropriate to the nature of our species in its natural, savage or bestial state. The related quests to first understand and then to realize justice are in fact part of the human attempt to transcend the limits and barbarism of our biological natures and to behave toward each other in ways that, at a minimum, neutralize our innate savagery and even go beyond that minimum to emphasize and nurture the best of our characteristics.⁸⁵ The very premises of the Rule of Law are in large part such a

⁸³ One metaphysically generated vision of the social nature of humanity is represented by the statement, "[t]he intelligence of the universe is social." See MARCUS AURELIUS, *MEDITATIONS* (G.M.A. Grube trans., 1958). The scientific end of the spectrum can be found in EDWARD O. WILSON, *ON HUMAN NATURE* (1978), in which a biological basis is sought for human values and behavior. Wilson argues:

[L]et me state in briefest terms the basis of the second dilemma . . .

[I]nnate censors and motivators exist in the brain that deeply and unconsciously affect our ethical premises; from these roots, morality evolved as instinct. If that perception is correct, science may soon be in a position to investigate the very origin and meaning of human values, from which all ethical pronouncements and much of political practice flow.

Id. at 5.

⁸⁴ Green made the following observation about Aristotle:

[He] recognized that the exercise of what he called phronesis, practical wisdom, was central to both politics and morality. Phronesis, according to Aristotle, was one of the intellectual virtues, and it was simultaneously a necessary ingredient in the exercise of any of the moral virtues and was incapable of being exercised independently of the moral virtues.

GREEN, *supra* note 79, at 177.

⁸⁵ "Again, men have no pleasure, but on the contrary a great deal of grief, in keeping company where there is no power able to over awe them all. For every man looketh that his companion should value him at the same rate he sets upon himself . . ." HOBBS, *LEVIATHAN*, *supra* note 51, at 404.

governing system, one designed not only to protect the interests of those in power but to inhibit the worst in us while allowing us to explore some of our best potentialities.⁸⁶ Justice, and the willingness to challenge injustice, is the defining and evolutionary principle of humans.⁸⁷

V. JUSTICE AS PREFERENCE AND BELIEF

Our most cherished principles of justice are grounded in preference and belief. The particular preferences and beliefs are deeply rooted and powerful. They often have, as part of their tradition, centuries of religious, cultural, constitutional and philosophical tradition.⁸⁸ They may be deeply set, core beliefs, untouchable by evidence or argument.⁸⁹ However, they are beliefs and preferences about which we have made choices, usually subtle and unknowing.

⁸⁶The function of society is to protect its citizens while creating conditions conducive to what Aristotle called "human flourishing". This idea is an integral element of John Finnis's work. See FINNIS, *supra* note 6. See also JOHN M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 89-143 (1975). See EDWARD O. WILSON, ON HUMAN NATURE (1978). Wilson describes two fundamental dilemmas being faced by human societies. "The first dilemma is that we have no particular place to go. The species lacks any goal external to its own biological nature." *Id.* at 3. He goes on to say that:

Educated people everywhere like to believe that beyond material needs lie fulfillment and the realization of individual potential.

But what is fulfillment, and to what ends may potential be realized?

Id. at 3 (emphasis added).

⁸⁷See, e.g., "The fool hath said in his heart there is no such thing as justice, and sometimes also with his tongue . . ." HOBBS, LEVIATHAN, *supra* note 51, at 418. Hobbes is poorly understood, maligned by people whom I fear have never actually read his work.

⁸⁸See, e.g., THE WORKS OF PLATO (Irwin Edman ed., 3d ed. 1928). "[N]o man voluntarily pursues evil, or that which he thinks to be evil. To prefer evil to good is not in human nature; and when a man is compelled to choose one of two evils, no one will choose the greater when he may have the less." *Id.* at 244-45. This sounds good, but there is no real justification in fact for the statement. Of course it does describe what we would like to exist, and also has some important political implications.

⁸⁹See GREEN, *supra* note 79. This determines how we think and what we desire. See H.F.M. Crombag et al., *On Solving Legal Problems*, 27 J. LEGAL EDUC. 168 (1975). The authors make the point that, for skilled individuals, logical analysis may be an *after the fact* process of justification of an already chosen or preferred end rather than the process of reaching that end after a precise series of steps. In an analogy to reasoning in chess, skilled players, "seem in many instances to reason from the end to the beginning, i.e., regressively, in such a way that the hypothetical solution becomes prescriptive for the solving process." *Id.* at 169.

The fact that justice is a preference does not trivialize it. The opposite is true.⁹⁰ Because the principles of justice are part of powerful belief systems which, once set, are virtually unalterable, they help determine the basic fabric of a particular society. They provide, for example, the value systems drawn upon by American presidents and legislators in determining the limits of government. They guide and limit the decisions of lower court and Supreme Court justices.⁹¹ The fit is neither neat nor explicit but people rely upon their belief systems when making decisions about conflicts between fundamental matters.⁹²

This suggests several considerations about any undertaking that insists on having justice as a primary focus. One is that I (and anyone else) can speculate about, but never prove the ultimate nature of justice. I can assert, but never establish beyond the fact of my assertion, that God created a universe within which justice not only exists but possesses a definable character. I would like this to be so, and may believe it to be so, but honesty requires that I admit complete ignorance about the truth of the proposition. The best I can say is that it is true that many people believe the proposition to be valid and that therefore it is not politically irrelevant to society and to decisions made pursuant to the belief. I can argue that humans possess a quality or faculty, either natural or God-given or both, that links them to the natural justice of the universe. About these and similar propositions voluminous *summas* have been written.⁹³ For

⁹⁰"To exercise good judgment is to get optimum results under less than optimum conditions or on grounds which are less than decisive." GREEN, *supra* note 79, at 177. Return also to Aristotle's idea of phronesis, or practical wisdom, discussed *supra* note 84. Because we have the power to define what we are and control what we do, the exercise of wise judgment must be one of our most fundamental powers. But what do we teach and write about in American law schools that demonstrates this or nurtures the skill?

⁹¹ See SEGAL & SPAETH, *supra* note 70. "The challenge of politics and public service is to discover what is interfering with justice and dignity for the individual here and now, and then to decide swiftly upon the appropriate remedies." ROBERT F. KENNEDY, *THE PURSUIT OF JUSTICE* 10 (Theodore J. Lowi ed., 1964).

⁹²The problem is that we are afraid or unwilling to deal with the implications of this fact. We fear knowing ourselves because our insecurity causes us to be afraid of what we might find if we truly see ourselves as we are. "[M]any people in our day find it almost impossible to realize that Socrates, in his precept 'know thyself,' was urging upon the individual the most difficult challenge of all. And they likewise find it almost impossible to understand what Kierkegaard meant when he proclaimed, '[t]o venture in the highest sense is precisely to become conscious of one's self.'" MAY, *supra* note 11, at 55-56.

⁹³ See, e.g., THOMAS AQUINAS, *THE SUMMA THEOLOGICA*, in which he describes the various stages and degrees of justice and law, and KANT, *supra* note 33.

all their massive elegance, however, the main content of everything we actually *know* about justice rather than what we *believe* could have been said in a few pages. That is all we can know and are likely to ever know about the ultimate truth of those propositions. On the other hand, this does not make the beliefs irrelevant because humans use them to implicitly ground their systems and guide their decisions.

VI. PRACTICAL JUSTICE

A system of governance and political order dependent upon widespread acceptance of shared fundamental values such as opportunity, tolerance, fairness and rationality begins to disintegrate when those shared beliefs lose their force. In our system they have, over the past twenty years, become victims of a combination of both truth and ignorance. We have become overwhelmingly selfish, a nation of opportunists and hustlers, racists of every skin color abound, and we refuse to tolerate any position but our own. Of course, such attitudes have always been with us but we have struggled to overcome them or at least to keep them under control. Now they have been somehow glorified as desirable, undoing painful centuries of progress. If we do not commit ourselves to strengthening the quality of personal awareness and commitment, the institutions and the positive shared beliefs of our society as a community committed to taking others' well-being into account, we will experience a period of decline into a political and economic dark age from which it is unlikely we will be able to climb back out within our lifetimes or our children's lifetimes.⁹⁴

When we consider justice as a central element of a justice mission pursued by American law schools, therefore, we should think about how best to examine it in ways that are meaningful for advancing our practical understanding of justice in our society, including its most essential part, injustice.⁹⁵ This does not mean we ignore theoretical, moral, emotional and spiritual material on the concerns and nature of justice and injustice, some of which may even be ultimately true, although we are unlikely to ever know. At

⁹⁴I sought to describe this incredibly dangerous and accelerating process in, *The Purposes of the University*, *supra* note 20. This condition takes our arguments about our primary responsibilities from the abstract to the concrete. Whatever we might say about the roles of law school and legal scholars in theory, reality is so filled with despair, danger and crises, that to continue "business as usual" is to completely abdicate our responsibility to address the challenges of this world.

⁹⁵"For not to know the nature of justice and injustice, and good and evil, and not to be able to distinguish the dream from the reality, cannot in truth be otherwise than disgraceful to him, even though he have the applause of the whole world." PLATO, *Phaedrus* in THE WORKS OF PLATO 313 (I. Edman ed. 1928). Ellul adds, "The rules obeyed by a technical organization are no longer rules of justice or injustice. They are "laws" in a purely technical sense." ELLUL, *supra* note 11, at 133.

a minimum, those materials represent integral sources from which our belief systems about justice have been derived.⁹⁶ If they are shunted aside, then we are ignorant of the critical principles that create and sustain the foundations of our thought and belief. That is precisely what we seem to be doing, however, as American society departs increasingly from the ability to know, understand, share and communicate about such fundamental issues.⁹⁷

The Rule of Law is a rapidly decaying construct, overwhelmed by social and economic conditions that have already weakened the beliefs and institutions essential to its continuity and stability. The efforts of Rawls, Dworkin, Finnis and Perry have in large part been struggles to sustain and repair the foundation of the Rule of Law, a foundation attacked by many CLS adherents as undeserving of support.⁹⁸ Law faculty in America are uniquely situated to help

⁹⁶Think, for example, of the meaning and derivation of Hobbes' fundamental principle: "*Do not that to another, which thou wouldest not have done to thy self; . . .*" HOBBS, *LEVIATHAN*, *supra* note 51, at 321. This is nothing more nor less than a reiteration of the Golden Rule.

⁹⁷The fragmentation within academic legal thought has become extreme. We throw inane jargon about, deconstructing rather than reconstructing everything we touch, and practice an unthinking nihilism as if we were the intellectual equivalent of the Baader-Meinhof gang committed to destroying the foundations of the existing system without the faintest idea about what we are dismembering or what might take its place. In part, I think this is what Paul Carrington was attempting to resist in his excoriated essay. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). The time has come for us to put aside our silliness and our pseudo-intellectual pretensions and to face the world in all its beauty and ugliness. We must learn to use our minds to deal practically, meaningfully and effectively with the real world. Richard Hofstadter captures a key part of the distinction in his contrast between the intellectual perspectives possessed by our Founding Fathers and our approaches to knowledge and politics.

But this was not simply because, as some modern critics seem to imagine, the Founding Fathers were better than we are, though they probably were better. It is not simply that Jefferson read Adam Smith and Eisenhower read Western fiction. The fundamental difference is that the society of the eighteenth century was unspecialized Today knowledge and power are differentiated functions. When power resorts to knowledge, as it increasingly must, it looks not for intellect, considered as a freely speculative and critical function, but for expertise, for something that will serve its needs.

RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 427-28 (1970).

⁹⁸The vulnerability of the Rule of Law has much to do with our awareness of our own weakness. Boorstin describes the need for humans to appeal to deeper principles somehow grander than themselves:

The discovery, or even the belief that man could make his own laws, was burdensome [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdoms about his society. Scrupulous men were troubled to

lead the effort to reconstruct the values of the Rule of Law, or to define a new system. This reconstruction and rearticulation must be positive, coherent, conscious, and linked to the deep and fundamental values contained in a theory and operating construct of justice, a construct that must begin with clearer connection to our own humanity and responsibilities to others.

The quest to define this new system must begin to infuse our scholarship, teaching and service activity. If it does not, then the rest of what we do will become increasingly trivial. As we think about researching, teaching and serving justice, we must take an enriched understanding of the basic ideas about justice and our essential humanity as a threshold for departure. Our focus should be primarily on questions that include:

1. What do we consider to be a just society?
2. What are the terms of such a society?
3. What kinds of behaviors tend toward facilitating the creation of such a society?
4. What behaviors undermine a society we consider just?
5. How do we or ought we organize our political institutions so that they behave in a manner we consider just?
6. How do we or ought we ensure that our institutions are generative, adaptive, self-evaluative and regenerative?
7. What ideals are integral to a workable vision of the individual and social human committed to living a just life?
8. What can law faculty, law schools, lawyers, judges and legislators do that helps American society address the awesome challenges it faces?

In answering these questions we must deal with several aspects of the justice issue. These relate not only to *what* we should do but *how* it ought to be done. Involved is not only what and how, but *for* whom, *to* whom, *with* whom, and *on account of* whom? All these questions relate to the fact that justice is vitally human and a permeative idea, one that emanates from within us, not simply a linear or logical equation. By "permeative" I mean that the spirit of justice fills, influences, modifies, defines, critiques, interacts, nurtures, condemns, and so forth. In this sense, justice is a force or spirit that is everywhere within us, in others, and in our institutions, not something abstract and external.⁹⁹

think that their society was governed by a wisdom no greater than their own.

BOORSTIN, *supra* note 69, at 74.

⁹⁹It is in part the attitude reflected in ARTHUR S. MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT (1984). The spirit of justice contains within it an active intolerance for injustice, one captured by the following passage:

"Faith. Well, I see that *saying* and *doing* are two things, and hereafter I shall better observe this distinction.

"Chr. They are two things indeed, and are so diverse as the Soul and the Body: for as the Body without the Soul, is but a dead Carkass, so

VII. CHOOSING THE MEANING OF JUSTICE

The key point is that we may choose to define justice in this way and, in so doing, create workable truths about justice. To a significant extent our choices create the meaning of justice.¹⁰⁰ While taking into account the limitations of human nature and humans in society, and understanding that there are limits to our perfectibility and almost no limits to our cruelty and stupidity, we possess significant power and latitude to define ourselves and our systems in ways that create increased tendencies to move us toward the good we choose, albeit haltingly and imperfectly.¹⁰¹

Our gains will always be fragile, and subject to being overwhelmed by our latent savagery, self-centeredness and greed. Nor, assuming we make some progress, can we ever afford to be complacent. The struggle is never-ending. Even our best people and efforts become corrupted after a short while due to our inability to handle power, our natural pettiness, greed and ability to hate. We humans are very strange creatures who, without a carefully nurtured impulse to justice, defined as *doing good for others and treating them as we would like to be treated*, repeatedly demonstrate the naturally vicious side of our nature.¹⁰²

Saying, if it be alone, is but a dead Carcass also This *Talkative* is not aware of, he thinks that *hearing* and *saying* will make a good Christian: and thus he deceiveth his own Soul. *Hearing* is but as the sowing of the Seed; *talking* is not sufficient to prove that fruit is indeed in the heart and life: and let us assure our selves, that at the day of Doom, men shall be judged according to their fruits. It will not be said then, *Did you believe?* but, were you *Doers*, or *Talkers* only? and accordingly shall they be judged."

JOHN BUNYAN, *THE PILGRIM'S PROGRESS* 85 (Wharey ed., 1928).

¹⁰⁰"[F]ormulating judgments that appeal to these conventions, under the tutelage of creative and more experienced judges, is one of the ways we learn the art of making such judgments. As Aristotle would put it, we learn to make such judgments by making them ourselves." GREEN, *supra* note 79, at 181.

¹⁰¹[I]f the better elements of the mind which lead to order and philosophy prevail, then they pass their life here in happiness and harmony—masters of themselves and orderly—enslaving the vicious and emancipating the virtuous elements of the soul; . . . nor can human discipline or divine inspiration bestow any greater blessing on man than this.

PLATO, *Phaedrus*, *supra* note 95, at 286.

¹⁰²Once again, the Golden Rule. The fascinating thing is that virtually all of our political constructs can be traced back to this as an operating principle. It is either that we are good in an important element of our nature and we share this principle, or, we are something else and this is the only attitudinal value that tends to create a system of society that protects us from ourselves and each other. Either interpretation is sufficient.

The function of justice is consequently far more the amelioration of our innate viciousness and pettiness than the realistic expectation that our choices will make us truly "good" or that we are naturally good.¹⁰³ It may, however, create an increased tendency to behave in ways that advance justice and to subtly invest our decisions with such values. We must be careful to avoid naive expectations about the extent of its effect on much of our behavior. Justice is primarily a check on the inevitable abuse of power. Awareness of, and resistance to, injustice is the dynamic through which we seek to realize the ideal and rectify the mistakes all societies make in their treatment of people.

VIII. THE JUSTICE MISSION OF AMERICAN LAW SCHOOLS

If the above statements are valid, they help answer the question whether faculty in American law schools ought to pursue a justice mission in their teaching, research and service. Begin with the simple and obvious premise that the law and its institutions and processes are central to how power is created, divided and applied.¹⁰⁴ The law and legal institutions play major roles in defining, legitimating and enforcing allocations of rights and obligations, privileges and opportunities.¹⁰⁵ The law and legal institutions sanction certain

¹⁰³Hobbes and Aristotle are among the few political theorists who were realistic about the dangerous nature of the human species. This realism was not shared by the optimistic thinkers of the Enlightenment, who should have known better.

¹⁰⁴See Christopher Stone, *From a Language Perspective*, 90 YALE L.J. 1149 (1981). Stone offers this analysis about the main focus of American legal scholarship: "Current scholarship obviously has a breadth, richness, and volume that defy any summary judgment. If I had to offer one broad generalization, I would call it overwhelmingly risk averse: clarity and not-being-wrong dominate imagination." *Id.* at 1153. Stone then goes on to describe legal scholarship in America as representing primarily three levels of activity. The "base level" at which most of legal scholarship is directed, involves legal scholars who "aim at conventional intellectual housekeeping: summarizing, unveiling common underlying elements, smoothing over apparent inconsistencies and propounding advances and retreats, usually within modest bounds." *Id.* at 1154. The second level advances a vogue, in which a flurry of attention is concentrated on a particular topic or technique. "Neutral principles," the insanity defense, condemnation, state action, the digesting of Rawls and the Coase Theorem— . . . " *Id.* Stone's third level "takes place in what we might call 'schools,' which have a longer lifespan than the vogues, enlist a broader membership, and like schools in any discipline, define themselves by a shared theme or technique." *Id.*

¹⁰⁵"[T]he human being tries to escape his destiny of solitude by becoming completely embedded in one of the massive modern group formations." BUBER, *supra* note 28, at 201. The need to conform and belong is tremendously powerful. The typical new law graduate initially confronts these pressures possessing only naive assumptions. These are quickly shaken if not shattered.

kinds of behavior, approve and facilitate other kinds, and ignore other categories.¹⁰⁶

We may choose to claim that preferences of justice do not come into this system, but such claims are either ploys or a smugly unexamined acceptance of the status quo. They do not fairly represent the legal system's reality or that of any functioning political system. Law faculty may have, for example, chosen in 1870 and thereafter to accept Christopher Langdell's claim to have created a scientific methodology for the study of law, and in doing so thought they could productively cut out of academic law all that was considered unscientific. But as already discussed, we did not actually create a science of law. Instead we neutered our intellects and methodologies, and relegated ourselves to arid equivocations on a barren field of largely sterile doctrine.¹⁰⁷

Langdell's formulation had two unfortunate consequences—it made irrelevant and illegitimate *both* the study of justice *and* the study of the practice of law—one because it was *merely* metaphysics, and the other because it was too practical, applied and vocational.¹⁰⁸ We are now experiencing attempts in legal scholarship and law teaching to develop and reintegrate the missing

When this happens, the prevailing values of the system of law rush in to fill the vacuum.

¹⁰⁶Peter Berger observes, "most of the time we ourselves desire just that which society expects of us. We want to obey rules. We want the parts that society has assigned to us." BERGER, *supra* note 54, at 93.

¹⁰⁷The result is as Ayer put it in 1978: "Anglo-American law has let itself be shunted into a backwater of human thought, where fresh tides of insight have passed it by. It appears that we are trying to operate with outworn, or at least shopworn, intellectual merchandise" John D. Ayer, *Isn't There Enough Reality to Go Around?, An Essay on the Unspoken Promises of Our Law*, 53 N.Y.U. L. REV. 475, 476 (1978). Obviously there has been a significant change since Ayer's comments. The law schools have experienced a continuous stream of intellectual experimentation and movements to such an extent that legal scholars would be hard-pressed to capture the current chaos in any rational pattern. Many of the experiments have been committed to infusing legal thought with the "fresh tides of insight." Others have been extremely political. Combined, the movements are both exciting and in many ways intolerantly anti-intellectual, regardless of their posturing.

¹⁰⁸"Every part of a technical civilization responds to the social needs generated by technique itself. Progress then consists in progressive dehumanization—a busy, pointless, and, in the end, suicidal submission to technique." THE TECHNOLOGICAL SOCIETY, *supra* note 11, at viii. One of the main obstacles to intellectual and humanistic change in the legal profession, is that the *technique* of the professional system, its rules and expectations, mechanisms of implementation, skill core, and intensely technical structures is so powerful that it defines us far more than we influence it. Little wonder that even the best reform proposals simply gather dust or, if pressed, are shattered when they come up against the rigid walls of the system.

pieces of a system that had been artificially divided into the three distinct aspects: theory, applied thought, and action.¹⁰⁹ Each of these is important but tends to become rapidly lifeless and hopelessly circular if not linked in meaningful ways with the other elements.¹¹⁰

IX. FULFILLING THE JUSTICE MISSION IN TEACHING, SCHOLARSHIP AND RESEARCH

During the Justice Mission conference, plenary presenters and workshop discussants sought to describe their ideas concerning how law faculty could act in some dimension of their professional lives in ways that contributed to the advancement of the justice mission. We began by assuming the existence of a mission captured by the linked concepts of justice *and* mission, which includes the ideas not only of inquiry but action. We accepted the premise that our responsibility was to define and advance justice, and to challenge injustice. Little time was devoted to questioning the existence of a justice mission. The willingness of 120 law faculty to begin at that point demonstrates the extent to which attitudes concerning the nature and function of legal education and legal scholarship are changing.

The simple fact that an increasing number of law faculty share a minimal level of inchoate agreement on the admittedly vague idea of some type of

¹⁰⁹"There are three major schisms which Marx proposes to heal: (1) between man and nature, (2) between man and his work, (3) between individual men and society Marx's humanism is the synthesis which results from his concerted endeavor to achieve this threefold unification." COLLINS, *supra* note 8, at 225. Marx failed. A strand of clinical education has been attempting this for twenty years. Jack Himmelstein's humanistic movement of the 1970s was a leader in this effort. Now a part of ADR and professional responsibility work fits into the effort to rejoin the pieces that the traditional model of legal education sundered. See RICHARD L. ABEL, *AMERICAN LAWYERS* (1989). See also Robert F. Drinan, S.J., *Moral Architects or Selfish Schemers?*, 79 GEO. L.J. 389 (1990).

¹¹⁰"The rational study of values or ends, has been viewed as off limits to most scholars." Auerbach, *supra* note 5, at 473. Failure to understand the reasons for action and the ends of action weakens us in fundamental ways. We have become afraid of the responsibility of choice and action. Consequently, we have hidden between the illusion of scientific neutrality, seeking to pretend that it is of empirical certainty and appropriate to our work within a system of politics and values in which choices must be made at levels of uncertainty and ambiguity that are totally foreign to science as we have understood it. This neat and prudent rationalization renders us secure but impotent. It can no longer be allowed. We have the responsibility as scholar-citizens to do what we can to help the democracy deal with its challenges. Robert Kennedy argued: "Today we cannot tolerate passive citizenship or passive commitment to freedom any more than could the father of the first democracy." KENNEDY, *supra* note 91, at 8.

"justice mission" reveals virtually nothing about what that mission might actually be, or how priorities ought to be established and resources allocated.¹¹¹ "Agreement in principle" when the extremely general principle allows us to feel good without requiring us to do anything, is a common phenomenon. Most people are, for example, in favor of slashing the federal budget—until their own programs are affected. Nearly everyone claims to be an environmentalist, but few act consistently with intelligent environmental strategies. As long as the supposedly revolutionary concepts are kept loosely phrased, and the commitment to the general principle does not require us to change what we are doing, then many law faculty could be found who are willing to profess belief in a justice mission.

The real issues raised by the acceptance of a justice mission are not so thin or abstract, however. The justice *mission* carries within it an obligation to act. This obligation to act, to engage with the conditions of real society, reflects a basic dilemma that has long confronted the inhabitants of the related worlds of religion and academia. This dilemma, that of the almost diametrical contrast between active engagement and passive withdrawal, involves the degree to which one is impelled to confront, address, and seize the world in all its unforgiving harshness and commit to bettering the lot of struggling humanity.¹¹² This commitment to social humanity competes with the contradictory view that sees the conditions of life as corrupting and impure, diverting us from exploring and evolving our higher selves whether we conceive that self to be resident on philosophical, intellectual, or religious planes.¹¹³

¹¹¹"To analyze is to take apart, to dismember and scrutinize; it is, in short, to distinguish. It would be too limiting a view to say that philosophy is simply the activity of analysis Philosophers have also been concerned with synthesis." GREEN, *supra* note 79, at 203. In part we are still limiting ourselves to analysis, on the one hand, and unsubstantiated political conclusions on the other. Neither is adequate. One of the directions we must go is in learning how to construct and build solutions through law for a society in great need and turmoil. To do this we must understand that society far better than we do, and seek to learn the law as a constructive and facilitative tool rather than only a defensive one. Since we ignore the legislative process except in the limiting context of undermining and challenging legislation through courts and administrative process, we are almost completely ignorant of the methods and context of *constructive* and *facilitative* law.

¹¹²"Thou wilt soon die, and thou are not yet simple, not free from perturbations, nor without suspicion of being hurt by external things, nor kindly disposed towards all; nor dost thou yet place wisdom only in acting justly." AURELIUS, *supra* note 83, at 266-67.

¹¹³No attention was devoted to the practical arts or the manipulative arts; no attention was given to understanding or valuing specific, concrete phenomena or to controlling the direction of earthly change. The fully realized person had higher, better things to do. And that person still remains in the background for teachers

This latter attitude of withdrawal dominates among many scholars and clerics, leading to "retreat from the world" movements, whether implied in Plato's concept of knowledge revealed in his allegory of the Cave, the contrasting Buddhist approaches reflected by Hinayana and Mahayana thought (greater and lesser paths), cloistered monasticism in Christianity, the Ivory Tower university, or Christopher Langdell's scientific law in which the experienced practitioner became *persona non grata* on the faculties of American law schools.¹¹⁴ The conflict represented in these two competing and fundamentally opposed views of obligation is profound. In the one, the scholar seeks enlightenment and truth, but, like the Buddhist *bodhisattva*, makes the choice to help humanity rather than accepting *nirvana*.¹¹⁵ In the other, the scholar chooses a path preoccupied with personal enlightenment, shutting out the "noise" of the world as a distraction.¹¹⁶

today. Man was defined . . . in terms of what Plato conceived to be his perfection: to be fully human was to exist in a condition of love or pure, unalloyed rationality . . .

GREENE, *supra* note 10, at 72.

¹¹⁴"The dignity of human labor consists not only in its ministration to bodily needs but also in its role as the main agent for the development of man's mental and moral constitution." COLLINS, *supra* note 8, at 227 (discussing Marx's analysis of the function of labor). Langdell split the idea from the act and the reality of law and in doing so demeaned both the law and its practice. The difficulty for law schools is that much of the actual practice of law corrodes our moral constitution. We need to ask how it does this and how humans trapped within the system can make survival and developmental decisions that both protect against the pressures of immorality and amorality, and also allow realistic development of the human who happens to be a lawyer.

¹¹⁵Murti describes the distinct orientations of Hinayana and Mahayana Buddhism in language that applies equally to the choice of scholars and teachers who either retreat from the world or seek to engage with it and change it for the better.

The ideal of the arhat is the highest state of the Hinayana systems [T]he Arhat rests satisfied with achieving his own private salvation; he is not necessarily and actively interested in the welfare of others. The ideal of the Arhat smacks of selfishness; and there is even a lurking fear that the world would take hold of him if he tarried here too long. The Bodhisattva makes the salvation of all his own good. He shuns retiring into the final state of Nirvana, though fully entitled to it, preferring, by his own free choice, to toil for even the lowest of beings for ages.

T.R.V. MURTI, *THE CENTRAL PHILOSOPHY OF BUDDHISM* 263 (1960).

¹¹⁶[The man governed by principle] "first of all, would be awesomely clearheaded, both about himself and about the world he lives in. He would not be without the fears and anxieties that so often stand between us and our better selves. But neither would his behavior be controlled by them." GREEN, *supra*

The very acceptance of something called a "justice mission" continues the process of removing the American law school from the orthodox monasticism that dominated the institution for considerably more than a century. This articulation of a justice mission is critical because the language we choose as our central definition of activity is symbolic and creative. Ideals are not simply language. They generate and focus power.¹¹⁷ They help to clarify and define what we do. Choosing the ideal of a *justice mission* is itself a critical first step, but it is nothing more than a necessary but insufficient condition of a process of challenge and fundamental change. Unless taken as a defining premise, extended, and made specific in our actions the ideal will dissipate quickly into irrelevance. A series of basic questions must be identified, defined and addressed if the justice mission is to be pursued. These questions include:

1. How intense is the justice mission?
2. What are its elements?
3. How do we work them out in our teaching, scholarship and service?
4. What are the limits on the mission dictated by the fact that law schools are part of universities and this role imposes an obligation to seek truth in an unbiased way?

Many similar questions could be asked that raise complex and troubling issues about the validity, extent, legitimacy and degree of directness of any justice mission. Universities have multiple responsibilities, some of which

note 79, at 168. There are few such individuals. Most choose the comfort of belonging.

The frightening idea that an intellectual ceases altogether to function as an intellectual when he enters an accredited institution (which would at one stroke eliminate from the intellectual life all our university professors) may be taken as a crude formulation of a real problem: there is some discord between the imperatives of a creative career and the demands of the institution within which it takes place. Scholars have long since had to realize that the personal costs of working within institutions are smaller than the costs of living without institutional support. Indeed, they have no real choice: they need libraries and laboratories perhaps even pupils which only an institution can provide.

HOFSTADTER, *supra* note 97, at 427.

¹¹⁷ See ANSHEN, *supra* note 56. PLATO, *The Republic*, in THE WORKS OF PLATO 397 (I. Edman ed. 1928) [hereinafter PLATO, *The Republic*]:

We were enquiring into the nature of absolute justice and into the character of the perfectly just, and into injustice and the perfectly unjust, that we might have an ideal. We were to look at these in order that we might judge of our own happiness and unhappiness according to the standard which they exhibited and the degree in which we resembled them, but not with any view of showing that they could exist in fact.

Id. at 430-31.

conflict with each other if taken too far.¹¹⁸ The nature of the university sets constraints beyond which it may not be wise for the institutional university to go.¹¹⁹ Just as it can be argued that the inherent nature of being a judge limits the prudent use of authority to matters within the sphere of legal and political decision making, and that regardless of a particular judge's beliefs and morality about the wisdom of a legislator's decision, the language must be followed, so too by being part of the university there are limits on what it is appropriate for us to do. The question is that of how far can, or should, the law schools push their responsibility to contribute to the quality of justice within society without seriously weakening the special mechanism of the university and the university law school?¹²⁰

The Justice Mission conference sought to begin a dialogue directed toward illuminating these questions. Similar efforts are found throughout American law schools, although they are generally phrased around less grandiose formulations of justice. We attempted to put something of a structure on the question of the responsibility to pursue justice, and chose the three prisms of teaching, scholarship and service, the primary paths through which law schools and law faculty act.

¹¹⁸ For extended analysis of these issues see *The Purposes of the University*, *supra* note 20; *Revolution in American Law Schools*, *supra* note 24; *The University Ideal*, *supra* note 5; *Prophets, Priests, and Power-Blockers*, *supra* note 14.

¹¹⁹ See articles cited *supra* note 118. See also CHOMSKY, *supra* note 20. The ideals of the university and the scholar possess a sense of unreality. Chomsky captures the reality when he writes, "It is impossible to escape the fact that the university is ultimately a parasitic institution, from an economic point of view. It cannot free itself from the inequities of the society in which it exists." *Id.* at 311.

¹²⁰ See articles cited *supra* note 118. See also HOFSTADTER, *supra* note 97, at 427: [F]or intellectuals in the disciplines affected by the problem of expertise, the university is only a symbol of a larger and more pressing problem of the relationship of intellect to power: we are opposed almost by instinct to the divorce of knowledge from power, but we are also opposed, out of our modern convictions, to their union. This was not always the case: the great intellectuals of pagan antiquity, the doctors of medieval universities, the scholars of the Renaissance, the philosophers of the Enlightenment, sought for the conjunction of knowledge and power and accepted its risks without optimism or naivete. They hoped that knowledge would in fact be broadened by a conjunction with power, just as power might be civilized by its connection with knowledge.

Id.

First of all, it needs to be made clear that the justice mission is not the only appropriate and necessary function of law schools. No argument is being made that justice either is or should be the only frame of reference.¹²¹ Quality of technical training, precision of undertaking, service to legitimate technical interests, and learning how to organize and apply large volumes of professional data are all necessary aspects involved in being a modern law school."¹²² Law schools do have experience in serving these ends and while they could address them much more honestly, efficiently and effectively, the technical and doctrinal dimensions of law school are becoming stronger. In any event, within a professional and technical system, those aspects will always receive substantial attention, even to the extent that they dominate the institutional focus as has been the case since Langdell.

What law schools and faculty have never done, however, is to explore in a systematic manner the questions raised by the obvious fact that the law is the most central and profound method through which power, and therefore justice, is dealt with in a society grounded on acceptance of the Rule of Law.¹²³ The hypocrisy implicit in this deliberate ignorance is deep, troubling, dishonest and profound. It is not necessary to quibble over the extent to which law schools are the source of values, concepts and attitudes about the role of law and the nature of justice in American society in order to accept the obvious fact that the law school process has *some* important role in defining such concerns for many of the students who go through the process.¹²⁴ If it does, then we have some responsibility to think about the implications and content of what we do and

¹²¹ The law schools are schizophrenic organizations, uncomfortable with their technical, political and intellectual functions. Pure intellectual inquiry drives us in a direction that is increasingly attenuated from the context of the practical interests of judges and lawyers. Political inquiry, including justice and injustice, inevitably challenges the decisions and behaviors of judges and the institutions of the legal profession. Attention to technique and professional rules seems to be less than ideal, yet it occupies an enormous proportion of our research and teaching. It enables us to take the safe path, avoiding the dilemma of "[t]he teacher who believes in stimulating and developing potential [who] will be challenging, at least implicitly, the legitimacy of credentialing systems, which sort and rank people according to market demand." GREENE, *supra* note 10, at 92.

¹²² "It is pointless to discuss 'the function of the university' in abstraction from concrete historical circumstances, as it would be a waste of effort to study any other social institution in this way." CHOMSKY, *supra* note 20, at 299.

¹²³ See LAWRENCE FRIEDMAN, *AMERICAN LAW* 275 (1984); CHOMSKY, *supra* note 20, at 299. Michael Ariens responded to this point by the comment that "My view is that our blindness to justice is a function of our unswerving allegiance to the Rule of Law. We should go beyond it." (Written comments made on an early draft of this Article.)

¹²⁴ See, e.g., Roger Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978).

how we do it. If it does not, then it becomes less clear why we exist. Certainly, other more simple methods can be used to train law students in the technical skills and knowledge needed to enter into and function at the preliminary stages of law practice.¹²⁵

Until quite recently, however, law faculty have more or less cleverly avoided confronting the fundamental questions. Instead they engage in largely empty analyses based on an incomplete methodology of inquiry that lacked a positive ethical, moral and political grounding.¹²⁶ This represents the fundamental dilemma with which law faculty individually, and law schools institutionally, are faced. Preparation of more than 120,000 students per year in the 170 plus schools who are licensed to educate people desiring to become members of the practicing bar, exerts enormous, and often anti-intellectual pressures on law faculty to do things in their teaching that serve the students' interests and perceptions of what they need in order to become *good* (effective and well-compensated) lawyers, to pass the bar examination, and to interest prospective employers.¹²⁷ This is an inevitable byproduct of the specific system we have created.

The above factors, together with others that include an ancient curricular structure that restricts experimentation and, perhaps more importantly, relieves law faculty of serious obligations to develop more inventive and flexible approaches to the basic substance of law school instruction; the rigidity and power of the bar examinations, and the value structure of the job of the lawyer, fashions a system that is one only of law, not of justice.¹²⁸

¹²⁵ *Prophets, Priests and Power-Blockers*, *supra*, note 14, at 164-67.

¹²⁶ Law faculty are neither scientists, nor philosophers, which demands the attitude reflected in the observation that: "Whereas he who has a taste for every sort of knowledge and who is curious to learn and is never satisfied, may be justly termed a philosopher?" PLATO, *The Republic*, *supra* note 117, at 413.

¹²⁷ Compare the attitudes of law students with that described by Plato: "I am a lover of knowledge, and the men who dwell in the city are my teachers. . . . For only hold up before me in like manner a book, and you may lead me all round Attica, and over the wide world." PLATO, PHAEDRUS, *supra* note 95, at 257.

¹²⁸ Law schools may, for example, "force suppression of . . . humanistic and ultimately spiritual qualities in many lawyers." Gary S. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 8 (1975). A result is that:

Education . . . is becoming oriented toward the specialized end of producing technicians; and, as a consequence, toward the creation of individuals useful only as members of a technical group, on the basis of the current criteria of utility individuals who conform to the structure and the needs of the technical group. *The intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit*

By ignoring the soul of the law and that of the human being who happens to be a lawyer, the schools convert the law students into expressions of "technique", causing their human side to atrophy and leaving many of them unprepared to face the moral chaos and distortions inherent in law practice.¹²⁹ Simply put, the deck is stacked and most law faculty have been content to accept the rules of the game and the cards as dealt. Realistically, law faculty are the dealers and croupiers in a set of profitable casinos. They know they must fulfill their function according to the house rules, or new dealers will be hired who are willing to do so.¹³⁰

What we were urging through the structure of the conference agenda is that some of the basic rules of the game be changed. Pressure to make law faculty act responsibly is not a new phenomenon. With all the abuse proponents of Critical Legal Studies (CLS) have heaped on others and have themselves been buried beneath, CLS has, in essence, been urging that we examine systemic behavior that is fundamentally unfair and unjust.¹³¹ The Clinical Movement began from a vision of a just society.¹³² At its base, the more recent renaissance in jurisprudential teaching and scholarship stems in large part from attempts to deal with aspects of justice.¹³³ Feminist teaching and scholarship represent powerful formulations of what their proponents consider to be reactions to the

for the group They will be the servants, the most conformist
imaginable, of the instruments of technique.

THE TECHNOLOGICAL SOCIETY, *supra* note 11, at 349 (emphasis added).

¹²⁹Of course, the legal profession as a system of technique is able to remain largely unchallenged from within when it controls the professionalizing experience of its new members. "But when technique enters into every area of life, including the human, it ceases to be external to man and becomes his very substance. It is no longer face to face with man but is integrated with him, and it progressively absorbs him [T]echnique has become autonomous." THE TECHNOLOGICAL SOCIETY, *supra* note 11, at 6.

¹³⁰See, e.g., HOFSTADTER, *supra* note 97.

¹³¹See ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1987). *But cf.* William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L. J. 665 (1988), in which Unger's work is criticized as unworthy of scholarly attention.

¹³²See *The University Ideal*, *supra* note 5.

¹³³See, e.g., VALERIE KERRUSH, JURISPRUDENCE AS IDEOLOGY (1991); Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853 (1992).

injustices wrought by a male-dominated society.¹³⁴ So are the various strands of race and civil rights oriented work.¹³⁵

There is so much justice-premised work going on right now by law faculty that we must be considered to be at a preliminary stage of profound change.¹³⁶ Most of it is idiosyncratic and movement oriented. Much of it is activist based and reactionary. Our task is to try to sort it out, recognizing that it will be impossible for quite some time to create a coherent framework in relation to work that is of such an intense character and reflective of deep ideological beliefs.

X. DEFINING AND CHOOSING A NEW IDEAL

This journey through the ideas of justice has been leading to a destination that is summed up quite simply. The starting point for our action should be internal, *within us as law faculty*, rather than external or descriptive of all the intriguing things we do. This is what is missing. A fascinating range of experiments and activities can be found in American law schools. Columbia,

¹³⁴Leslie Bender, *Feminist (Re) Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L. J. 848; Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & LAW 1 (1992); Emily Jackson, *Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal*, 19 J. LAW & SOC'Y 195 (1992); Kenneth Lasson, *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 1 (1992); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Linda C. McClain, *'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Symposium: *Recent Work in Feminist Legal Thought*, 59 TENN. L. REV. 441-616 (1992).

¹³⁵See, e.g., T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 COLO. L. REV. 325 (1992); Derrick Bell, *The Racial Preference Licensing Act*, 78 A.B.A. J. 50 (Sept. 1992); Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992); Richard Delgado, *Zero-Based Racial Politics and Infinity-Based Response: Will Endless Talking Cure American's Racial Ills?*, 80 GEO. L.J. 1879 (1992); Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988); Stephen M. Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835 (1992); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992); Symposium: *Employment Discrimination, Affirmative Action, and Multiculturalism*, 41 DEPAUL L. REV. (1992); Symposium: *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. (1992).

¹³⁶See *Revolution in American Law Schools*, *supra* note 24.

NYU, Chicago-Kent, Baltimore, Tulane, Cleveland State, Maryland, Stanford, CUNY and many other law schools are engaged in activity admirable in its innovative character. This was made clear in the design and organizational phase during which I developed the conference agenda with the help of the steering committee, and many others.¹³⁷

But just as Christopher Langdell shaped more than a century of law school education through a powerful articulation of the premise that law was a doctrinal science, the appellate opinions of judges were the raw materials, and the law faculty were the scientists, we must define a simple, clear ideal to capture who we want to be, what we study, for what ends, and with what tools. This is the source of our emptiness. The Langdellian construct was highly imperfect and in any event has broken down, and appropriately so.¹³⁸ We must choose a new ideal.

The new ideal must be one in which we choose an internally based value and concept that defines us and the emerging conditions of the culture we desire to help create. If we do this, the external, programmatic dimension of what and how we teach, what we write and how we serve will emerge automatically. Driven by an ideal that defines our sense of self and intellectual mission, we will instinctively reshape our actions, our institutions, and the quality and texture of the connections between ourselves and the external world through which we must operate, understand, evaluate, and influence.

What is capable of replacing the ideal of law as science, judges' opinions as data, and law faculty as scientists? From my perspective the answer is straightforward. Nor is this automatically or necessarily inconsistent with Langdell's hypothesis (and this is surprising even to myself since I usually "come to bury Christopher Columbus Langdell, not to praise him"). In the context of Langdell's formulation, not simply the *language*, science *was* the driving force for identifying and resolving fundamental social problems.¹³⁹

¹³⁷In the year leading up to the conference, more than one hundred people provided ideas about innovative approaches to serving some kind of justice mission through the instrumentality of the American law school. I was not able to incorporate all the suggestions into a two-day conference which was a very densely packed experience in itself, and I have never adequately thanked those who responded to my inquiries concerning the nature of a "justice mission." At some point I hope to be able to represent their ideas more fully.

¹³⁸Francis Allen suggests a breakdown in communication between law faculty, judges and lawyers, asserting, "Many in the Law schools are speaking a language incomprehensible to lawyers and judges." Francis Allen, *Legal Scholarship: Present Status and Future Prospects*, 33 J. LEGAL EDUC. 403, 404 (1983).

¹³⁹Martin L. Smith, *supra* note 24, comments on recent NAS report titled "On Being a Scientist" as representing three primary ideas: "(1) the relationship between 'the objective' and 'the subjective' in scientific research, (2) the social mechanisms within science that contribute to its authenticity, and (3) the wider social responsibilities of the scientist." Martin adds:

Given the aggressive American attitude toward problem solving, science can be understood as the spirit and methodology by which we assumed we would be able to most effectively gain the fullest understanding of our relevant piece of human reality and then translate that understanding into action. Science was the way in which we stripped centuries of illusions bare.¹⁴⁰ We no longer needed the ancient slogans and mystical phenomena of metaphysics because science provided the only methodology through which we could truly understand, test, and address the world. Langdell's legal scientists were intended to be those who had not yet been blinded by the masks, corruptions and experiences of life. They were like the mathematicians and "geometricians" of Aristotle, who were able to see the speculative (and purportedly true) realm of knowledge most clearly because they lacked the corrupting experience of the practical life.¹⁴¹

Langdell's formulation is therefore completely understandable, not only in terms of his cultural moment, but in relation to his implicit metaphysical assumptions concerning the nature and quality of knowledge, and the identity of those best able to see to the highest knowledge through the mists that conceal reality. The irony is that those scientists who insist this is the only valid way to perceive the world are grounding themselves on entirely unprovable assumptions. Thus, they created a new methodological theology, intolerant of other methods, while unaware of its own mystical presuppositions.

Langdell's formulation did, however, seek to address its society and its needs through the assumption that if we were able to understand the law scientifically, then we would be able to use that knowledge to deal with the needs of the society through the instruments of law. You would not need classical philosophical jurisprudence because science would provide all the truths that were necessary and legitimate. The other assumption that served as

In the early days of modern scientific methods and goals (dominated by empiricism, rationalism, and positivism), researchers' examination of the physical world commenced with the premise that there is an antithesis between the objective and the subjective. Subjectivity and various subjective personal elements (e.g., human interpretation and judgments, relativity, values, cultural expressions and limitations emotions, biases and prejudices) were to be stripped away

Id.

¹⁴⁰ See SCHWEITZER, *supra* note 24. From our increasingly jaded perspectives it is almost impossible for us to understand the incredible exhilaration and joy that the promise of a clear, totally penetrating methodology of knowledge, i.e. science, generated in the period in which it was fresh. People knew enough to have concluded the traditional ways were unsupportable and unjustifiable, the accumulated detritus of centuries of extreme rationalism and religious mystification. Langdell must be fairly understood as a child of his time, one in which science promised everything, a tool that elevated humans to the level of being able to understand, and do, everything.

¹⁴¹ See ARISTOTLE, *POLITICS*, *supra* note 53.

an essential ingredient of the Scientific Enlightenment, of which Langdell must be considered a part, is the Socratic belief that humans are by nature good, and that the only thing we must do through education is to show them the true nature of the good and they will follow it automatically. These assumptions are unwarranted and fundamentally flawed, but have dominated our mindset for centuries.

Although we have learned since Langdell that these assumptions are not fully valid, the values and intent behind Langdell's assumptions still apply full force to how we in the law schools ought to define our roles and responsibilities. Langdell can be fairly understood as committed to the betterment of society as the responsibility of the academic scientist. He came to Harvard during an era when lawyers were public leaders and their obligation and commitment to serving society assumed.¹⁴² It was a defining characteristic of the lawyer's task. This means that our ideal, part of which can be stated as *full understanding and use of the law and values of justice as the means to a better society*, is consistent with the values which served as the basis of Langdell's formulation but which have not been followed in our actions as law faculty.

Our responsibility is to recognize the ideal of understanding and social betterment as an underlying premise in our definition of self, and to apply that ideal to what we do. This means we must learn other disciplines and interpret them into terms relevant to the law and its consequences.¹⁴³ This also means that we must become far more aggressive in critiquing and informing the institutions of our society concerning the fairness and unfairness of what they do.¹⁴⁴

¹⁴²James Kent believed, for example:

A Lawyer in a free country, should have all the requisites of Quintilian's orator. He should be a person of irreproachable virtue and goodness. He should be well read in the whole circle of the arts and sciences. He should be fit for the administration of public affairs, and to govern the commonwealth by his councils, establish it by his laws, and correct it by his example.

2 ANTON-HERMAN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 181, 182 (1965).

¹⁴³Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985). Elliott offers an intriguing perspective on "[l]aw . . . [as] a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own." *Id.* at 38.

¹⁴⁴For the first century, law teaching in American colleges with rare exception, had as its clear aim "preparation for public leadership deserving of public trust." Paul Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L. J. 741, 757 (1992). He continues: "Academic law teaching was initially undertaken to effect moral education—to transmit republican virtue to democratic leaders. Early law teachers were thus prophets of democracy." *Id.* But cf. Harold Berman, *The Crisis of the Western Legal Tradition*, 9 CREIGHTON L. REV. 252 (1975). Berman describes the "crisis" of the

Various descriptions of the active commitment to justice were offered throughout this article, in large part because they demonstrated that whenever cultures have examined the issue of justice in society, they have arrived at the same essential conclusion. While truth rests at the basis of every ideal worthy of our commitment, so does action designed to help realize that truth. This active responsibility to work toward realization of justice in human society was the basis of John Bunyan's question of those who would seek to enter Heaven, "but were you *doers* or *talkers* only"?¹⁴⁵ It can be found in the spirit of the *boddhisattva* who, though entitled to flee the troubling concerns of earthly existence, chose in an act of ultimate compassion to remain and work to improve the lot of others.¹⁴⁶ It is implicit in Aristotle's description of justice as the highest virtue precisely because it is not self-centered but is defined by our awareness of what is good for others and our willingness to engage in action consistent with that awareness.¹⁴⁷ It is even reflected in Plato's allegory of the Cave, because Plato's message is that those who would be *philosopher-kings* must first turn away from the shadows of the cave toward the light of full knowledge and understanding; but after attaining the light of knowledge they must then return to apply their understanding to human affairs.¹⁴⁸

The active principle is also a vital component of what we call the Golden Rule, *do unto others as you would have them do unto you*. This principle requires action, not simply thought, and is the operational principle of nearly every political philosophy.¹⁴⁹ It is the most powerful statement of the underlying principle of social organization because, if followed, it tends to produce greater fairness, concern for others, and tolerance. It helps us to avoid the total self-centeredness that tears apart political communities. In summary, therefore, for law faculty the new ideal is perhaps captured best by Abraham Maslow's description of the desirable characteristics of the healthy human:

1. Clearer, more efficient perception of reality.
2. More openness to experience.
3. Increased integration, wholeness, and unity of the person.
4. Increased spontaneity, expressiveness; full functioning; aliveness.
5. A real self; a firm identity; autonomy, uniqueness.
6. Increased objectivity, detachment, transcendence of self.

Western legal tradition to be one in which we "are unable to identify a common purpose other than that of training in analytical skills." *Id.* at 264.

¹⁴⁵ BUNYAN, *supra* note 99.

¹⁴⁶ MURTI, *supra* note 115.

¹⁴⁷ ARISTOTLE, *Nichomachean Ethics*, *supra* note 65.

¹⁴⁸ FREEMAN & APPEL, *supra* note 37.

¹⁴⁹ See Aristotle's conception of justice in *Nichomachean Ethics* as requiring action, *supra* note 65.

7. Recovery of creativeness.
8. Ability to fuse concreteness and abstractness.
9. Democratic character structure.
10. Ability to love, etc.¹⁵⁰

XI. CONCLUSION

In *The Winding Passage*, Daniel Bell remarks that since at least the 14th century we have been seeking to discover methods that will allow us to see through the concealing mysteries and veils that cloud our understanding to discern the reality of human life and the nature of the universe.¹⁵¹ We have, however, taken for granted the purpose of the mission, creating a situation where, to paraphrase Marshall McLuhan, "the method is the message."

It is time we make conscious what we are doing and why. For the past two centuries we have increasingly lost touch with the connections between our *selves* and our methodologies of inquiry, understanding and action. There is a strong connection between our method and our own meaning. To transcend the limits of our method and our current conception of our *selves*, we must identify and generate new methods that allow us to *see differently*.¹⁵² Just as the scientific method has converted the world of knowledge into increasingly microscopic units isolated from other units, and externalized our vision into discrete data rather than into insights into our own humanity, we have come to reflect the way in which our method conceives that world.

I believe this rapidly increasing desire to reconceive our *selves*, by reconceiving our methods, lies beneath some of the new scholarly movements that have emerged in American law schools. In this I would include the new emphasis on literature and story telling as being part of a method that seeks to both seize and communicate to the non-verbal, deep-value center of us, and to legitimate this center as an important source of principle and communication. Literature also offers a form of communication that operates in ways that allow us to share insights not fully transferable into technical language, and may enable us to learn how to translate some of the insights into the more formal structures of precise language.

¹⁵⁰MASLOW, *supra* note 22.

¹⁵¹DANIEL BELL, *THE WINDING PASSAGE: ESSAYS AND SOCIOLOGICAL JOURNEYS 1960-1980* (1980).

¹⁵²Our conceptual structures and their internal content determine how and what we perceive. If we lack certain concepts as well as a verbal and nonverbal language for perception and interpretation then we simply do not *see* the reality as it is as opposed to how we *think* or *feel* it is. This has long been recognized as part of the human dilemma of sharing and communication. Part of our task is to recognize the need for new languages, structures and methods that allow us to fill in the gaps in our ability to perceive and communicate in terms richer than we do at present. It is a process of intellectual empowerment.

What we have forgotten or perhaps never really understood is that our mission in this universe, our very role and purpose in existing, emerges from our central core of identity, how we conceive our *selves*. The kinds of knowledge we seek derive from how we understand our *selves* and our purposes. A basic truth is that we hope to gain an understanding of what we are by exploring the mysteries. This is because, for those raised in the Judeo-Christian or Hebraic traditions, knowledge is not only the path to ultimate understanding but the means through which we can heal the schism between ourselves and God represented by our expulsion from Eden. Even if this biblical story is a myth, it has penetrated us to such fundamental levels that it infiltrates our being and aspirations. If it is not a myth, then the drive is not only powerful and directive, but powerful, directive and rich. In either case it is a fundamental part of our value systems. This unarticulated drive to rejoin our fragile and imperfect humanity with what we perceive as the ultimate core of meaning rests at the base of our millenia long quest for knowledge. Unfortunately, we have been looking only in our telescopes and microscopes when we should have been looking in mirrors.

We have of late begun to recognize that *scientism* is only one method. We have now begun to fashion our mirrors. Our new mirrors need to be cast from the finest of glass and silver because our existing ones are cracked, clouded and warped through neglect. Our task is to learn which mirrors reflect most clearly and accurately, and to learn the techniques required to construct better ones.

It is in the reflection of the mirrors that we will find the reality of our *selves*, one intimately and inextricably linked with justice and injustice. We have increasingly sensed this. Much of our recent scholarship can be understood as implicitly about justice. A glance at any compilation of recent articles reveals a continual stream of writing that attempts to challenge, prophesy, rectify, clarify, patch, hypothesize or offer scientific truths about specific conditions of injustice. This rapidly burgeoning process is much like the working of the free market, in which the massive force of billions of individually self-interested decisions add up to a collective and defining truth. It can be argued that such a process is going on in American law schools, that the content of legal knowledge is being internally redefined as scholars generate a steadily growing mass of material concerned with the many levels and varieties of justice.

Something need not be called a justice mission in order to *do* justice or be about justice in a meaningful way. In fact, too much explicit dialogue about justice would quickly become tiresome. If, however, we are caught inside a confused system that does not know what it is about, the ideas must be brought to the conscious level for examination, refinement and choice. After we have made conscious choices about what we want to be, we can allow the deep metaphors, of which justice is the most fundamental, to become submerged once again.

In the process of doing this many law faculty are exploring new implications of their subject matter, of their nature as humans who have accepted the responsibility of an important task, and of the nature and needs of the political communities to which they belong or are obligated. Law faculty are doing this through methods that include such devices as: antithesis and critique, challenge and confrontation, shock, direct action, social science, economics,

literature, language, and by "scavenging" the insights of other disciplines including philosophy, ethics, morality, religion, mathematics, literary criticism, political economy, political science, linguistics and anthropology.

Much of the effort is about language and its interpretation. Literary criticism, semiotics and deconstruction are responses to the need for methodologies of inquiry into the subject matter of law (which necessarily includes human nature and purpose, for what else is law about?) which offer promise for dealing with the inordinate complexity of law. Deconstruction can even be compared with that branch of physics concerned with atoms and the building blocks of a the physical universe. Physicists believe that if we can only understand the nature of matter and the organizing forces of attraction and repulsion we would then be able to move from comprehension of the building blocks of reality comprised of the tiniest phenomena to the infinite in a fundamental transformation of our understanding.

Central to this quest is the desire to reduce the apparent complexity that surrounds us by gaining knowledge of that from which everything else emerges. These physicists sense that from an infinitely small, infinitely dense, timeless point of absoluteness emerged a universe that instantaneously became infinitely large. This underlies our recurring belief that we must break everything into atomistic dimensions in order to achieve that magical transformation. To achieve this infinite truth, however, we must first learn to ruthlessly remove all that clouds our vision. We must first *deconstruct* the illusions to arrive at truth.

Ironically, such conceptually elegant formulations can only take us so far. Physicists who have spent generations seeking ultimate certainty have instead found Einsteinian relativity, randomness, Werner Heisenberg and uncertainty. They have found a probabilistic, rather than absolute, universe that may only be one of many possibilities rather than a fixed and ultimate finality. Deconstructionists should also understand, just as have physicists, the limits of their search and their method. Strip away and reduce all that they will, there may still be a mystery at the center of human thought and judgment that they cannot penetrate. At the center is us, and we have only barely begun the process of creating our *selves* because our journey was detoured along a tangent for several centuries. An essential part of our creation of *self* must be justice and an intolerance for injustice. Unless it is, the creature we create will continue to be far less than it can be.

